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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,
Petitioner,

v.

EAGLE RESEARCH CORP.,
Respondent.

On Petition For A Writ Of Certiorari To The Circuit Court Of Putnam County, West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a jury's award of compensatory damages that is based on no record evidence of loss to the plaintiff violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause guarantees meaningful judicial review of a jury verdict to ensure that an award of damages is based on at least some record evidence.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Emerson Electric Company and Daniel Industries, Inc., were defendants below, but prevailed at trial and are respondents under this Court's Rule 12.6.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Emerson Electric Company is the parent company of Daniel Measurement Services, Inc., and that no other publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 6

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT 7

II. THIS IS A SUITABLE CASE IN WHICH TO CLARIFY THE APPLICABLE DUE PROCESS PRINCIPLES 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Ashland Oil, Inc. v. Caryl,
497 U.S. 916 (1990) (per curiam) 17

Belknap v. Boston & Me. R.R. Co.,
49 N.H. 358 (1870) 13

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 8

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930) 8

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 8

Flippo v. West Virginia,
528 U.S. 11 (1999) (per curiam) 18

Giaccio v. Pennsylvania,
382 U.S. 399 (1966) 8, 14

Herron v. S. Pac. Co.,
283 U.S. 91 (1931) 9

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) .....*passim*

Jackson v. Virginia,
443 U.S. 307 (1979) 14

Memphis Cmty. Sch. Dist. v. Stachura,
477 U.S. 299 (1986) 14

Nat'l Mines Corp. v. Caryl,
497 U.S. 922 (1990) (per curiam) 17

Norfolk & W. Ry. Co. v. Ayers,
538 U.S. 135 (2003) 17

Ohio Bell Tel. Co. v. Pub. Utils. Comm'n,
301 U.S. 292 (1937) 6

Pac. Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 14

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 7

Thompson v. City of Louisville,
362 U.S. 199 (1960) 16

TXO Prod. Corp. v. Alliance Res. Corp.,
509 U.S. 443 (1993) 6, 10, 11

United States v. Battiste, 24 F. Cas. 1042
(C.C.D. Mass. 1835) (No. 14,545) 14

RULES

W. Va. R. App. P. 10(f) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1 2

STATUTES

28 U.S.C. § 1257 1

Ga. Code Ann. § 5-6-35(a)(6) 16

Ga. Code Ann. § 5-6-35(b) 16

OTHER AUTHORITIES

3 William Blackstone, Commentaries on
the Laws of England 9

U.S. Dep't of Justice, Office of Justice Programs, *State Court Organization 2004* (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Measurement Services, Inc. ("DMS") respectfully submits this petition for a writ of certiorari to review the judgment of the Circuit Court of Putnam County, West Virginia.

OPINIONS BELOW

The orders of the Circuit Court denying DMS's motions for judgment as a matter of law, for a new trial, and for reconsideration are unreported. Pet. App. 1a–5a, 9a–26a. The orders of the West Virginia Supreme Court of Appeals denying DMS's petition for discretionary review and dismissing Eagle Research Corporation's appeal are also unreported. *Id.* at 27a–28a, 31a–32a.

JURISDICTION

The Circuit Court entered final judgment and denied reconsideration on August 18, 2006. Pet. App. 22a–26a. The West Virginia Supreme Court of Appeals denied DMS's petition for appeal on May 22, 2007, but granted respondent's cross-petition for appeal. *Id.* at 27a–28a, 29a–30a. Shortly thereafter, respondent moved to dismiss its own appeal. The Supreme Court of Appeals granted that motion and dismissed the appeal on June 27, 2007. *Id.* at 31a–32a. On July 31, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 19, 2007. No. 07A83. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

This case provides the Court with the opportunity to clarify an important issue of constitutional civil procedure: the extent to which the Due Process Clause restrains a jury from awarding compensatory damages based on no record evidence. In the proceedings below, the jury entered a damages award of more than $10 million, apparently on a theory on which it was never instructed. Compounding the error, the trial judge completely abdicated judicial review of the verdict, recognizing the evident problem but allowing the award to stand without making any effort to determine whether a basis could be found in the record. And the State's sole appellate court denied discretionary review, meaning that *no* court has applied reasoned judgment to scrutinize the jury's verdict. This case therefore presents the Court with an ideal vehicle to consider the minimum process necessary for petitioner to be "deprive[d] of life, liberty, or property."

1. DMS developed a business concept for a system of remote terminal units ("RTUs") that would monitor the rate at which gas was flowing through a gas pipeline, transmit the data to central locations, and charge the pipeline owner a fee for viewing the data on a secure website. One necessary component of any such system was a flow measurement device,

and DMS solicited proposals from manufacturers of such devices. DMS asked bidders to assume that it would purchase 3,000 devices annually, but never committed to purchase 3,000 devices.

DMS selected respondent Eagle Research Corp. as a potential supplier based on its proposal. While they worked together to develop a workable RTU system, DMS and respondent executed a written confidentiality agreement that prohibited the sharing of each other's technology with third parties.

Ultimately, the project failed. Respondent developed several prototypes, which DMS bought using individual written purchase orders. And the two companies even exchanged nonbinding term sheets for a future purchase of flow measurement devices. But no written contract was ever signed, and despite having paid respondent more than $1 million over the life of the project, DMS decided to abandon the enterprise. DMS paid respondent $138,000 to settle all outstanding charges.

2. Despite the settlement, two years later, in April 2003, respondent sued DMS and two other companies in the Circuit Court of Putnam County, West Virginia. Respondent alleged that DMS had breached an oral contract to purchase 3,000 of its devices, and had misappropriated respondent's trade secrets. Evidence subsequently came to light that the design of respondent's flow measurement devices was not, in fact, a trade secret, and respondent abandoned that claim. Instead, it amended its complaint to assert a similar claim for breach of the confidentiality agreement.

The case went to trial. Respondent offered no testimony from any economist, accountant, or other financial expert to ascertain losses caused proxi-

mately by the alleged breach of the confidentiality agreement. Respondent's sole attempt to present such evidence—testimony by its principal about a purported "loss of competitive advantage" resulting from the alleged breach—failed for lack of foundation; respondent was forced to withdraw it, and the court precluded it. Pet. App. 34a–36a. Thus, there was no evidence that respondent suffered *any* ascertainable losses from DMS's supposed breach.

The judge instructed the jury accordingly:

> If you find by a preponderance of the evidence that the defendant, DMS, breached the confidentiality agreement entered into by Eagle Research and DMS, then you may award damages in an amount of money which fairly compensates Eagle Research to the extent possible, *for reasonable ascertainable losses caused proximately by the breach.*

Pet. App. 44a (emphasis added). Respondent has agreed that this charge was a correct statement of the law. *Id.* at 7a, 41a–43a. Respondent initially proposed another instruction, which would have told the jury that the measure of damages for the confidentiality claim was "Eagle's lost profits; or the Defendants' actual profits, whichever amount is greater." Plaintiff's Instruction No. 30-B. The trial judge sustained DMS's objection to this instruction, however. *See* Pet. App. at 42a, 43a–45a.

Despite the instruction to award only "reasonable ascertainable losses," the jury returned a verdict against DMS. The verdict awarded $10.5 million in consequential damages for breach of the confidentiality agreement and $4 million in consequential damages for breach of an oral contract. *See* Pet. App. 3a–4a.

3. DMS filed a timely post-judgment motion challenging the verdict. DMS's motion pointed out that there was no evidence in the record that could possibly sustain either the $10.5 million award or the $4 million award. Respondent did not counter with any evidence of damage to itself in the record—indeed, at the motion hearing, respondent's counsel told the court, "And what the jury was thinking in the jury room, one can only surmi[s]e. Who knows what they were thinking[?]" Pet. App. 8a. All respondent could offer was speculation that the jury might have awarded damages of $10.5 million based upon a theory of disgorgement of profits, even though the jury was never instructed upon such a theory. *See id.* at 8a, 53a–56a.

Ultimately, the trial judge denied DMS's post-trial motion as to the $10.5 million award, stating:

> I'm going to deny the defense motion [to set aside the confidentiality verdict] . . . though *I will tell you that I'm concerned with it.* . . . I did not instruct the jury that they could take their profits away from them. . . . And I'll be frank with you, I cannot recall now whether the plaintiffs at that time said, "Judge, this is a wrong instruction . . . ." I don't have a memory of that. I don't think you did, I'm not sure. *I can't wade through them all at this stage, and so I'm going to leave that as it is.*

Pet. App. 12a–13a (emphases added). Subsequently filed transcripts confirmed that respondent had *not*, in fact, objected to the jury instruction on damages, yet the trial court left the judgment in place. The trial court did, however, reduce the $4 million in breach of contract damages to a sum slightly less than $2 million.

4. DMS sought discretionary review in the West Virginia Supreme Court of Appeals, the sole appellate court in the State. DMS explained to the Supreme Court of Appeals that "the award of $10.5 million in damages to [respondent] for an alleged breach of the confidentiality agreement cannot be sustained without violating DMS' due process rights under the federal and state constitutions." Pet. for Appeal 49. Respondent cross-petitioned for appeal, seeking to have its full $4 million in contract damages reinstated.

The Supreme Court of Appeals voted 3–2, with Justices Albright and Benjamin dissenting, to decline DMS's appeal. Pet. App. 27a–28a. The court did vote unanimously to hear respondent's appeal (which would have permitted DMS to cross-assign as error the $10.5 million damages award, *see* W. Va. R. App. P. 10(f)), but to prevent further review, respondent sought and was granted permission to dismiss its own appeal. Pet. App. 29a–30a, 31a–32a.

REASONS FOR GRANTING THE PETITION

A jury's award of money damages, if not based on the law and the evidence, is nothing more than the use of state power to redistribute wealth at a few citizens' whim. The Due Process Clause guards against that eventuality by requiring a minimum level of rationality in the jury process—rationality that is wholly absent when a jury acts without evidence. Indeed, "the protection of the individual against arbitrary action" of this sort is the central aim of the due process guarantee. *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 302 (1937); *see TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453–54 (1993) (plurality op.); *id.* at 467 (Kennedy, J., concurring in part and concurring in the judgment)

("[The Constitution's] fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property.").

This case squarely implicates that settled rule. Indeed, in this case the record plainly demonstrates that the jury awarded the plaintiff more than $10 million in damages without *any* basis for that sum in the theory on which it was instructed. The trial judge stated that he was "concerned with [the verdict]," but he declined to set it aside because he could not recall whether he had given an instruction that might have justified the award. (The transcript, prepared subsequently, demonstrates that there was no such instruction. *See* Pet. App. 41a.) Accordingly, the jury's award is a naked deprivation of due process, and the West Virginia courts' complete failure to review it is contrary to the precedents of this Court.

The petition for a writ of certiorari should be granted to underscore that the Constitution requires a jury's award of damages—in any form—to be based on the law and the evidence, and that judges are constitutionally obliged to exercise meaningful review and control over the verdicts entered in their courtrooms.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

When a jury is sent off to deliberate with only the most general instructions to limit its "'wide discretion in choosing amounts'" of damages, the defendant faces "'an acute danger of arbitrary deprivation of property.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). Without a proper foundation in law, the jury's use of state power to seize property is nothing more than "arbi-

trary coercion" whose "basic unfairness" violates the Due Process Clause. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring, joined by O'Connor and Souter, JJ.). "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *Id.*

This Court has made clear over the years that this bedrock principle of the Fourteenth Amendment applies to *all* jury awards. Its recent holdings on that subject, however, have come primarily in the context of punitive damages. This Court should use this case to clarify, and re-emphasize, that every damages verdict must comport with due process: the constitutional prohibition on arbitrary, standardless jury awards "is not to be avoided by the simple label a State chooses to fasten upon its conduct." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966).

A. The jury "is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991). A jury's judgment therefore must comply with the guarantees of due process. *See, e.g.*, *Gore*, 517 U.S. at 572 n.17; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.").

The substance of those due process guarantees is drawn in the first instance from the common law.

"As this Court has stated from its first due process cases," the longstanding procedural protections of the common law "provide[] a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430. When a state court abrogates common-law procedures, it denies litigants the protections that informed the framing of the Fourteenth Amendment and its Due Process Clause. *See id.* Accordingly, "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication," this Court "has not hesitated to find the proceedings violative of due process." *Id.*

One of the common law's bedrock protections was the judicial power—and duty—to invalidate a jury verdict unsupported by evidence. *See, e.g.*, 3 William Blackstone, Commentaries on the Laws of England *387–88 (describing the "extremely ancient" powers of courts to set aside a "verdict . . . contrary to evidence" or "giv[ing] exorbitant damages"); *Herron v. S. Pac. Co.*, 283 U.S. 91, 95 (1931). Indeed, the very size of a jury's damage award could alone be sufficient evidence that the jury had acted not according to law, but according to "passion or prejudice."

With this firm basis in the common law, this Court's due process cases have long recognized that a jury's judgment must rest on more than just the jurors' say-so, because unchecked discretion would allow verdicts to be based on irrational and even invidious grounds. *See, e.g.*, *Oberg*, 512 U.S. at 432 (when a jury instruction "leave[s] the jury with wide discretion in choosing amounts," and when the jury hears "evidence of a defendant's net worth," the defendant faces an impermissible risk "that juries will use their verdicts to express biases against big businesses"). To be valid, the jury's verdict must have a basis in the record evidence. *See, e.g.*, *TXO*, 509 U.S.

at 468 (Kennedy, J., concurring in part and concurring in the judgment) ("It is a commonplace that a jury verdict must be reviewed in relation to the record before it. . . . [A] jury is bound to consider only the evidence presented to it in arriving at a judgment." (citations omitted)).

B. Applying these longstanding principles, this Court has repeatedly invalidated both damages awards based on jurors' arbitrary preferences and States' attempts to insulate those awards from judicial review. The jury verdict in this case, and the West Virginia judiciary's failure to exercise *any* meaningful review of that verdict at either the trial or the appellate level, is contrary to these holdings and warrants this Court's review.

The leading decision is *Oberg*, in which this Court invalidated an Oregon law—unique in the Nation—precluding judicial review of the amount of punitive damages awards. Trial judges could set aside a damage award if based on no evidence whatsoever, but could not reduce or remit an award, or grant a new trial based on an award's grossly disproportionate amount. *See* 512 U.S. at 426–27. The Court held that this significant abrogation of one of the common law's key procedural protections violated the Due Process Clause, because—as discussed above—the risk that juries will act arbitrarily is a significant one. Oregon's procedure eliminated judicial supervision without replacing it with any comparable safeguard. *See id.* at 432. That was contrary to due process, because the decision to award punitive damages "should not be committed to the unreviewable discretion of a jury." *Id.* at 435; *accord id.* at 436 (Scalia, J., concurring) ("The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for en-

forcing state-prescribed limits upon such deprivation violates the Due Process Clause.").

Oberg built on the broad agreement in *TXO* that postverdict review is constitutionally required. Indeed, Justice Scalia's *TXO* concurrence specifically addressed the situation here: "Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and *judicial review of the reasonableness of jury-awarded compensatory damages* (including damages for pain and suffering) . . . ." *TXO*, 509 U.S. at 471 (Scalia, J., concurring in the judgment, joined by Thomas, J.) (emphasis added). Justices Scalia and Thomas were the decisive votes for the Court's judgment in *TXO*. Justice O'Connor, dissenting for herself and Justices White and Souter, agreed with Justice Scalia and explained that the availability of postverdict judicial review had been essential to the Court's earlier cases sustaining suspiciously large punitive damages awards. *Id.* at 496–97 (O'Connor, J., dissenting). By contrast, in *TXO* the trial court had ruled summarily from the bench with no written findings, and "the Supreme Court of Appeals of West Virginia did not do much better," affirming in "three conclusory sentences." *Id.* at 497–98.

Thus, five Justices in *TXO* agreed that the Constitution requires postverdict review of the size of a damages award. It follows naturally that no matter how the constitutional minimum is described, postverdict review is *per se* inadequate if it permits a verdict to stand based on no evidence at all.

Here, the West Virginia courts' wholesale abdication of the judicial role required by the Due Process Clause was even *more* egregious than in *Oberg*. Oregon's procedure was constitutionally inadequate even

though an Oregon trial court could review punitive damage verdicts for a *complete* lack of evidence, and even though the trial court's rulings would be appealable as of right to the Oregon Court of Appeals. *See Oberg*, 512 U.S. at 419, 426–27. The circuit court in this case refused even to provide the minimal scintilla of process that was held inadequate in *Oberg*: the court acknowledged that it was "concerned" by the damage award, and identified no evidence consistent with the instructions with which to sustain it—but then left it in place. And whereas the Oregon court system allows an appeal as of right, which would have permitted further review when a trial court let stand a verdict based on no evidence, there is no appeal of right in West Virginia's two-tier system. No one can appeal until a majority of the Supreme Court of Appeals grants permission. Here, the discretionary denial of review meant that the jury's verdict was *never* reviewed on the merits, because the trial court failed to render a reasoned decision. That procedure is entirely inadequate in these circumstances.

C. *Oberg* and *TXO* happened to involve punitive damages, whereas this case involves compensatory damages. That is no basis for distinguishing this Court's reasoning.

Punitive damages are hardly constitutionally unique, just as their review at common law was not unique. Rather, the Court's cases applying excessiveness review have come in punitive damages cases because so many States had begun to give juries virtually unrestricted discretion to award punitive damages. Compensatory damages, by contrast, might appear at first blush to pose a lesser risk of arbitrary deprivation, because compensatory damages are intended to be capped by the amount of

proven harm, whereas punitive damages were thought to be capped only by the number of zeroes in the jury's imagination.

As this case illustrates, that supposed dichotomy is a false one, and indeed this Court's cases make clear that punitive and compensatory damages are subject to like constitutional restraints. In *Oberg*, this Court explained that the common law guaranteed the right to judicial supervision of a jury's verdict, and that the Due Process Clause incorporates that common-law guarantee; the cases on which the Court relied involved both compensatory and punitive damages. For example, the Court cited with approval a decision of the Supreme Court of New Hampshire setting aside *both* compensatory and punitive damages. 512 U.S. at 425 (citing *Belknap v. Boston & Me. R.R. Co.*, 49 N.H. 358, 374 (1870)). The same evident partiality that impeached the verdict as to one applied with equal force to the other.

Indeed, the Court took pains to note (citing the contribution of legal historians) that "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century." *Oberg*, 512 U.S. at 422 n.2. Because common-law practice at the time of the Fourteenth Amendment's framing informs the protections of due process, it follows that due process protects against irrational compensatory and punitive awards equally.

In fact, the Due Process Clause's prohibition on unrestrained jury discretion applies to virtually *every* context in which the jury sits. Thus, for example, the Court unanimously invalidated a law permitting juries "broad and unlimited power" to impose court costs on prevailing defendants in criminal proceed-

ings. *Giaccio*, 382 U.S. at 403. Likewise, in criminal cases the basis for the jury's verdict must be discernible from the evidence. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (due process requires this "impinge[ment] upon 'jury' discretion"); *see also, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986) (disallowing damages based on the "value" of constitutional rights in constitutional-tort litigation, because "were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants"). As Justice Story put it, "I deny, that, in any case, civil or criminal, [the jury] ha[s] the moral right to decide the law according to their own notions, or pleasure." *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545). A verdict contrary to all the record evidence is nothing more than jury nullification, and due process does not countenance jury nullification in any form that deprives a litigant of liberty or property. *See, e.g.*, *Oberg*, 512 U.S. at 434–35.

D. This Court's recent cases have emphasized two factors that may mitigate against standardless jury discretion. *See, e.g.*, *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19–22 (1991). Both are absent in this case, making the constitutional error in the jury's verdict all the more stark: The jury was not given instructions to confine its discretion, and there was no functioning system of judicial review to police the jury's compliance. Indeed, the jury was not instructed on respondent's disgorgement theory *at all* (and respondent's damages instruction was rejected), yet the West Virginia courts took no corrective action when the jury nonetheless returned an irrational damages verdict.

Moreover, even if the jury had been specifically cautioned not to return a verdict based on passion or prejudice, the absence of effective judicial review would deprive that instruction of any utility. "The problem that concern[ed this Court in *Oberg* was] the possibility that a jury will not follow [its] instructions and may return a lawless, biased, or arbitrary verdict" if it is not supervised by a judicial officer. 512 U.S. at 433. So too here, where the only review on the merits that the verdict received—at any level of the state judiciary—was the trial judge's statement that he was "concerned" by the verdict. Concern, unaccompanied by action, is not constitutionally adequate judicial review.

* * *

For each of these reasons, the West Virginia courts' failure to exercise their constitutionally mandated duty to set aside a baseless jury verdict is contrary to the decisions of this Court. Certiorari is warranted to prevent a recurrence of this basic error.

II. This Is A Suitable Case In Which To Clarify The Applicable Due Process Principles.

The trial court itself explained the significance of this case and others like it:

> There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed. . . . And I'm going to allow all of these to go to a jury.

Pet. App. 47a.

The West Virginia courts' predilection for submitting cases to the jury, even when the material

facts are undisputed, makes this Court's review in this case all the more appropriate. If the West Virginia judiciary will not exercise a screening function *before* a case is submitted to the jury, then it is all the more important that the State's judges follow the Due Process Clause's requirement that they exercise that function *after* each verdict. The two-tier structure of the West Virginia judiciary reinforces the need for review in a case like this one: the absence of appellate review as of right—indeed, in this case, there was no appellate review on the merits at all—compounds the due process problem.[1]

Furthermore, this case presents an ideal vehicle for this Court to clarify the due process principles that govern judgment as a matter of law. Because there was *no* evidence of damages on the claim for breach of the confidentiality agreement as it was given to the jury, *any* judicial remedy—whether a judgment notwithstanding the verdict, a new trial, or a remittitur set at zero—would in this case afford DMS complete relief from the constitutional injury. *Cf. Oberg*, 512 U.S. at 432 n.10 (holding that the Constitution requires *some* judicial review of punitive damage awards, while reserving "the more difficult question of what standard of review is constitutionally required"); *Thompson v. City of Louisville*, 362 U.S. 199, 199 (1960) ("Decision of this question turns not on the sufficiency of the evidence, but on

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[1] Appellate review of civil cases in New Hampshire and Virginia is purely discretionary, as in West Virginia, and some other States permit only discretionary review of certain types of civil verdicts. *See, e.g.*, U.S. Dep't of Justice, Office of Justice Programs, *State Court Organization 2004*, at 133-35 tbl.22 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf; Ga. Code Ann. § 5-6-35(a)(6), (b).

whether this conviction rests upon any evidence at all."). Taking this case would allow the Court to decide the general due process issue while permitting the substance of the required judicial review to percolate further. Moreover, because the case arises from a state court, there is not even a hypothetical conflict between the applicable due process principles and the demands of the Seventh Amendment.

Respondent may attempt to argue that this case is a poor vehicle because the jury's award of $10.5 million in compensatory damages in fact rests on something rather than nothing.[2] But the documents that respondent cited in the lower courts were wholly unrelated to respondent's lost profits. Rather, they were a sales exhibit and a demonstrative exhibit, prepared by respondent's counsel, of alleged profits for a non-party subsidiary of *DMS's* parent company—with no evidence of any connection to *respondent's* loss of profits from the purported breach. Pet. App. 50a, 51a, 53a–56a.

Finally, the identity of the court below is no obstacle to this Court's review. This Court has often recognized the need to review such decisions. *See, e.g.*, *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003) (reviewing a decision of the West Virginia Circuit Court); *see also, e.g.*, *Flippo v. West Virginia*, 528 U.S. 11 (1999) (per curiam) (summarily reversing

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[2] In the courts below, respondent also raised the meritless objection that DMS's challenge to the insufficiency of the evidence had been forfeited by a failure to object to the closing argument delivered by respondent's counsel. *See, e.g.*, Resp.'s Response to Pet. for Appeal 38–39. Neither the decision below nor the denial of discretionary review rested on any such basis, and this red-herring argument presents no obstacle to this Court's review.

such a decision); *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916 (1990) (per curiam) (same); *Nat'l Mines Corp. v. Caryl*, 497 U.S. 922 (1990) (per curiam) (same). Indeed, the structure of West Virginia's judiciary—in which appellate review can be denied by a bare majority of the State's high court—only heightens the need for this Court's scrutiny in federal constitutional matters. In this case, the denial of judicial review is part and parcel of the deprivation of due process that warrants this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 19, 2007

APPENDIX A

IN THE CIRCUIT COURT OF PUTNAM COUNTY,
WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. Civil Action No. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC., and
DANIEL MEASUREMENT SERVICES, INC.,

Defendants and Third Party Plaintiff,

v.

JIM BUTCH,

Third Party Defendant.

AMENDED FINAL JUDGMENT ORDER
and
RULINGS ON POST-JUDGMENT MOTIONS

On May 5, 2006, the Court entered an order granting judgment to the plaintiff. The parties then filed written post trial motions. On June 15, 2006, the parties appeared for purposes of oral argument on their various written post-trial motions. The Court announced its ruling in open court on the various motions, but the parties have been unable to agree upon a written order memorializing the Court's oral rulings. Following the hearing of June 15, 2006, the parties filed motions seeking this Court's reconsideration of certain rulings of the

Court announced at the June 15, 2006 hearing. The motions for reconsideration are considered in a separate order entered this date. Accordingly, the Court is of the opinion to and doth hereby order as follows:

1. The "Motion of Plaintiff for a New Trial Pursuant to West Virginia Civil Procedure Rule 59(a) Against Emerson Electric, Inc. and Daniel Industries, Inc., on the Plaintiff's claim for tortious interference with a contract is hereby **DENIED** for reasons stated upon the record.

2. The "Plaintiff's Motion for Attorney Fees" is hereby **DENIED** as the Court finds that the trade secrets counterclaim did not have a material effect on the Plaintiff and for other reason stated upon the record.

3. The Plaintiff's "Motion for Entry of Judgment Included Award of Pre-judgment and Post-judgment" is granted in part and denied in part as follows:

(a) Post-judgment interest on the total final judgment entered herein is granted pursuant to West Virginia Code §56-6-31 from May 8, 2006, the date of entry of final judgment, at the rate of ten percent per annum. The Court notes that this statute was recently amended by Acts of the Legislature effective June 7, 2006, but finds the former version of the statute applicable to this case.

(b) Pre-judgment interest on the Plaintiff's claim for breach of the contract to purchase the 2,954 flow meters is appropriate pursuant to West Virginia Code §56-6-27 because the Plaintiff's submitted this cause of action founded on contract to the jury and the jury made an award accordingly.

(c) Pre-judgment interest on the Plaintiff's claim for breach of the confidentiality agreement is denied because the Plaintiff did not submit this cause of action founded on contract to the jury and, therefore, waived any claim for pre-judgment interest on this breach of contract claim.

4. The Plaintiff's "Motion for Appointment of a Commissioner" and request for written and other discovery in aid of execution of judgment is **DENIED** as moot in light of the Court's intention to set an appeal bond at the appropriate juncture and for other reasons stated upon he record.

5. The Plaintiff's "Motion for an Appeal Bond" is deferred until the appropriate time.

6. The Plaintiff's "Motion for the Return of Source Code" is **DENIED**, without prejudice, pending a decision by the Defendants regarding reciprocal treatment of each party's source code, and for other reasons stated upon the record.

7. With respect to the jury's damage award of four million dollars regarding the breach of the contract for the purchase of the remaining 2,954 flow meters, even in a light most favorable to the Plaintiff, the evidence supports an award of no more than $1,993,950.00.

Additionally, the jury awarded the Plaintiff pre-judgment interest of $400,000.00 on its award of four million dollars, but that award should be reduced proportionately.

Accordingly, the Court limits the jury's award of four million dollars for the breach of the contract claim for the 2,954 flow meters to $1,993,950.00 and the jury's award of $400,000.00 for pre-judgment interest on his claim to $199,395.00,

and accordingly hereby enters **JUDGMENT** in these amounts against the defendant, Daniel Measurement Services.

8. Further, the Court concludes, for reasons stated upon the record, that it will not set aside the damage award for breach of the confidentiality agreement as sought by the defendant, but enters **JUDGMENT** against the Defendant, Daniel Measurement Services, Inc., in the amount of $10,500,000.00 for breach of the confidentiality agreement.

9. The Court enters **JUDGMENT** in favor of the Plaintiff, Eagle Research Corporation, on the counterclaim of the Defendant, Daniel Measurement Services, Inc., which were withdrawn during trial, in favor of the Third-Party Defendant, Jim Butch, on the third-party claims of the Defendant, Daniel Measurement Services, Inc.; and in favor of the Defendants, Emerson Electric Co. and Daniel Industries, Inc., on the tortuous interference claims of the Plaintiff, Eagle Research Corporation, because the Plaintiff did not file its claim within the statute of limitations as determined by the jury.

WHEREFORE, the Court is of the opinion to and doth hereby enter **FINAL JUDGMENT** in favor of the Plaintiff, Eagle Research Corporation, against the Defendant, Daniel Measurement Services, Inc., in the total amount of $14,781,051.50.

The Clerk of this Court is hereby directed to send a copy of this Final Order to (1) Ancil G. Ramey, Attorney at Law, Post Office Box 1588, Charleston, West Virginia 25326; (2) Roger A. Decanio, Attorney at Law, 1598 Kanawha Boulevard East, Charleston, West Virginia 25311; (3) William C. Forbes, Attorney at Law, 826 Oakwood Road, Charleston, West

Virginia 25314; (4) Michael Moore, Attorney at Law, Post Office Box 2031, Charleston, West Virginia 25327; (5) John L. Tate, Attorney at Law, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202-3352; and, (6) Robert J. McAugham, Jr. Attorney at Law, 3400 JP Morgan Chase Tower, 600 Travis Street, Houston, Texas 77002.

Entered this 3rd day of August, 2006.

/s/_____
O.C. SPAULDING, Judge

APPENDIX B

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. CIVIL ACTION NO. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIEL MEASUREMENT SERVICES, INC.,
and VALTRONICS, INC.,

HEARING had in the above-styled action before the Honorable O.C. Spaulding, Judge, on Wednesday, the 15th day of June, 2006.

* * * *

[Page 52]

. . . Court gave the jury on the measure of damages, is that in fact an accurate description in the law? Did I accurately instruct the jury how they were to measure it? And if it is accurate, tell me what the evidence was that shows the jury applied that law of measuring damages.

MR. DECANIO: Would you mind reading the section in the Court's instruction into the record?

THE COURT: Sure. "Then you may award damages in an amount of money which fairly

compensates Eagle Research to the extent possible for reasonably ascertainable losses proximately caused by the breach."

MR. DECANIO: Thank you, Your Honor. That instruction was perfectly correct because what the loss was caused by the breach of the confidentiality was the loss of this technology. Mr. Tate one time, I'm actually quoting Mr. Tate, he said before this Court that "once you let the cat out of the bag" -- it may not be an exact quote -- "it's out forever. We can not put it back in."

THE COURT: So they suffered loss of technology.

MR. DECANIO: Exactly.

THE COURT: Now, let's start calculating what the evidence was as to what the loss of this technology cost them. What's the evidence as to that loss?

MR. DECANIO: With regard to those damages, what the . . .

* * * *

[Pages 60-61]

. . . architecture in the Eagle computer found in their new computer but not in the old computer.

You had Mr. Randy Page testifying that he looked at the system architecture when obviously and clearly he was not an employee of DMS.

You had Mr. Randy Page and Irv Swartrzenberger, two leading developers of the new computer, 103/104, go down and review DMS.

THE COURT: I guess I just don't, I don't follow your argument.

MR. DECANIO: I think what I'm trying to say, Your Honor, is that the evidence shows that obviously there was a breach, there was evidence to show that this new computer was a result, and like you said in your instruction, a cause of that breach --

THE COURT: I'm assuming all that. We started this whole conversation with that assumption, okay?

MR. DECANIO: Okay.

THE COURT: Bottom line is I take it that your support that the jury followed the law on the measure of damages regarding the breach of the confidentiality agreement rests upon Plaintiff's Exhibit F, Plaintiff's Exhibit E, and that testimony you've just described to the Court.

MR. DECANIO: Correct. And what the jury was thinking in the jury room, one can only surmize. Who knows what they were thinking. Compromise or what, I don't know. But I believe they followed your instruction to the letter, Your Honor.

THE COURT: All right. Now, anything further you want to tell me? Do you want to address the issue that he raised that e-mails do not make a --

MR. DECANIO: Yes. That wasn't raised in Mr. Ramey's brief, but had it I would love to respond to it because I know there was a West Virginia Bar article about a year ago that came out and talked about how technology is forcing the law to keep pace with the change of the 21st century. I cited in my brief also The World is Flat by Tom Freidman which also talks about the change in business, the change in technology, how one doctor in the United States is actually sending via fiberoptic message an x-ray to India or New Zealand.

THE COURT: And what's your point?

MR. DECANIO: The point is, Judge, it's time to re-think this old archaic law; that in the age of electronics you should be making new law, Judge, in saying that e-mails do it.

THE COURT: Is that what your saying?

MR. DECANIO: Not new law, Your Honor. I'm just saying that it is the law. It is consistent with the law.

* * * *

[Pages 88-99]

. . . course, I read all this before I came in here and I've also read -- these are the remaining motions, okay. This stack here. Anyone wish to add anything to the remaining motions or do you stand upon your briefs and what's been set forth? I don't want to cut anybody off, but at the same time if you want to add anything, I'll permit either side to.

MR. FORBES: We don't have anything else to add, Your Honor. We're sure you can read and understand the issues.

THE COURT: Then the Court's ready to start ruling.

MR. RAMEY: Thank you, Your Honor.

THE COURT: The first thing the Court in evaluating that, I would comment, this is the only time, I would say in all of this long litigation, that I finally had agreement of the parties on something, and both of you agree I made a ton of errors in this case. And I find that comforting. It's the best job I've seen of pointing out the Court's error by both

sides. So I'm glad to see you at least agreeing on something. And I don't personalize it.

Now, let's -- The standard, you know, I've got to give all reasonable inferences to the non-movant party. And I can tell you that I've got some troubles in this case. And I'm going to specifically deal with them.

First of all, all the issues that have been raised by the defense regarding the contract, existence of the contract, the existence of the mutuality contract, the purchase contract, I think our record is pretty clear on that and, you know, if I'm wrong, I'm wrong. The arguments are there, they're stated. I always tended to give my reasoning and hopefully it can be judged accordingly, and I'm not going -- If I made a mistake, I'm going to continue to compound that mistake and I'm not going to find as a matter of law that there were no contracts in existence.

I will tell you though, that what I am -- And so I deny the defense motion.

I tell you what I am most troubled with in all of this -- this is where hindsight helps you see more clearly -- is the measure of damages in this case. Assuming arguendo that we have establishment of the contracts, et cetera, I'm still struggling with the measure of damages. And I will tell you at this point I'm going to reduce the verdict regarding the jury's award of damages on the breach of the contract for the sale and purchase. This argument today has helped me confirm what I thought. And let me tell you to what and why I am doing it.

The jury returned a verdict of $4,000,000 for the breach of the contract for the sale of the purchase. If I look at the facts in the light most favorable to the

plaintiff that you supply me, you give me $3,891,865, that which was testified by Mr. Butch. So looking at it totally in favor of the plaintiff, I still see the jury exceeding that.

Now, also though, the documents that have been given the Court today also tell me that the plaintiff has relied on Plaintiff's Exhibit No. 748, that was Mr. Butch's calculation. Also plaintiff has provided me Plaintiff's Exhibit No. 62 and also Plaintiff's Exhibit --

MR. DECANIO: No. 113, Your Honor?

THE COURT: Well, the other one I found no real help to me. I'm going to base my decision on 62 and 748. Now, I understand the physical document wasn't admitted into evidence, but we had testimony. And as you ably pointed out, Mr. Decanio, that jury took a lot of notes, they were given paper, they were given pencils, and had them.

Here's my problem. This calculation in Exhibit No. 748 I find speculative as to the issue of the add-ons. I'm going to use the term add-ons. You called them comm options, communications options. Your Exhibit No. 62 says, in describing the different prices, and this was sent by Dave Kimberling at Eagle Research, and his second one is $1,350, "based on your current commitment for 3,000 units during the next 12 months." So the plaintiff's evidence was that the commitment, when considered in the light most favorable to the plaintiff, was $1,350. That's what you state your understanding of their commitment.

Now, you're not entitled to the gross price, your own witness says you got fifty percent profit margin. So the jury was instructed they would have to

eliminate, reduce from that, your cost, et cetera, because you were limited to the measure of damages set forth on Pages 7 and 8. So you already were compensated out of the 3,000 units for 46 units, and I'm basically using Mr. Butch's own calculations. So that left you 2,954 units that you didn't get to sell, that the contract told you you were to sell. And of the -- Of those then, if you multiply that by $1,350, what you believe was the firm commitment as your Exhibit No. 62, that comes out to $3,987,900. That's the gross price. That's 2,954 units times $1,350.

Now, your own evidence is you're only entitled to fifty percent of that, that was your profit margin. So if I take fifty percent out of that gross price for which you had a contract, your lost profit was one thousand -- excuse me, $1,993,950. So I am reducing the jury's award to comport with the evidence in the light most favorable to the plaintiff and I'm reducing that award down to $1,993,950.

Now, let's deal with the confidentiality agreement. I'm going to deny the defense motion and I'm not going to reduce it, though I will tell you that I'm concerned with it. But if I look at it, everything in the light most favorable to the plaintiff, what I'm most concerned was obviously what I raised in my questions, and that is how I instructed the jury -- I'm talking about the breach of the confidentiality agreement -- the measure of damages. "Then you may award damages in an amount of money which fairly compensates Eagle Research to the extent possible for reasonably ascertainable losses proximately caused by the breach." I did not instruct the jury that they could take their profits away from them. Maybe that was

what the law allowed, maybe that was a proper way, but I didn't instruct the jury that way.

And I'll be frank with you, I cannot recall now whether the plaintiffs at that time said "Judge, this is a wrong instruction, you ought to be instructing the jury that they can base the measure of damages on the lost -- based on taking away profits." I don't have a memory of that. I don't think you did, I'm not sure. I can't wade through them all at this stage, and so I'm going to leave that as it is. I'm going to deny the defense motion in regard to that as well.

So essentially I have, to net it out, I'm denying the defense motions for the reasons previously stated, but I am going to reduce the jury's verdict as to the breach of contract regarding the sale of the purchase.

As to the plaintiff's motion for new trial on the issue of the breach of the confidential -- excuse me, breach of the torturous interference with the contract, that claim, you know, we've hashed that, we've thrashed it, I've got a record on it. If I'm wrong, I'm wrong. I'm going to deny that plaintiff's motion.

Now, let's take up all these others. Motion for appointment of a special commissioner, the Court denies. It's premature.

The Court denies the motion to order the defense to start providing sworn statements in aid of execution. Likewise that's premature, motion is denied.

Plaintiff's motion for entry of judgment, including award of prejudgment interest and post-judgment interest. Well, the prejudgment interest, you've got two issues. You got the breach of contract,

sale of purchase, the jury gave $400,000. The plaintiffs feel that the Court should increase that amount of $400,000. I'll be frank with you, I can't calculate -- I can't figure out how they got $400,000. They took ten percent of the amount. I know how they did it, I'm not sure based on the Court's instructions how they came up with that figure. And quite frankly, I'm not sure as to how to, whether that should be reduced or not.

Let me ask Mr. Ramey a question: Since I reduced the award, should the prejudgment interest award be reduced accordingly? Why or why not?

MR. RAMEY: In all likelihood, because you reduced it proportionately, you probably ought to reduce the prejudgment interest award proportionate. And I've done it roughly one half of the original verdict, so if the jury's intention, and we can only assume from the verdict it was their intention to calculate prejudgment interest on the gross award. Now because the gross award has been reduced by one half, it would make sense to reduce the prejudgment interest on that.

THE COURT: Mr. Decanio, Mr. Forbes?

MR. FORBES: Your Honor one, I like the Court am not quite sure how they arrived at the $400,000 figure. But if you read the Court's instructions in the previous -- or the verdict form in the previous thing, they found, agreed that Mr. Butch was entitled to prejudgment interest at ten percent per year of the contract. Then they come up with a $4,000,000 contract price, then they award ten percent of that. And I would assume, I think it's appropriate to reduce it by the amount the Court reduced the award, but do it per year for the entire term of the

six years of the contract for the years the contract was breached.

THE COURT: I'll decline to take you up on your offer.

MR. FORBES: The other problem is we don't know how they arrived at the figure because --

THE COURT: I'm going to reduce the award of prejudgment interest commensurate with the new award. We can see they took ten percent of $4,000,000, so take ten percent of $1,993,950 and that's prejudgment interest. The Court would find that that issue the plaintiffs requested, that prejudgment interest be submitted to the jury, they were entitled to that under 56-6-27, it was submitted to the jury, the jury made its decision. Again I'm not going to look behind that, I'm not going to increase it, I'm not going to say "well, how many years did they do it? One year, two years or ten years?"

As to the confidentiality agreement the plaintiffs now want me to add prejudgment interest to that. It's a contract issue, just like the other one was. The plaintiffs didn't submit it to the jury, so it's waived and the Court would deny prejudgment interest on the breach of the confidentiality agreement.

* * * *

APPENDIX C

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. Civil Action No. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC., and
DANIEL MEASUREMENT SERVICES, INC.,

Defendants and Third Party Plaintiff,

v.

JIM BUTCH,

Third Party Defendant.

ORDER DENYING MOTIONS TO RECONSIDER

Following the hearing of June 15, 2006, on post trial motions, both parties filed motions for reconsideration based on the oral findings of the Court made at the hearing. The parties were unable to agree on a written order reflecting the Court's oral findings of June 15, 2006. This order reflects the Court's rulings regarding both parties' motions for reconsideration.

The Court **ORDERS DENIED** the plaintiffs' Motion to Reconsider regarding the reduction of the amount of damages awarded by the jury for the breach of contract by Daniels Measurement Services

(DMS) for the sale and purchase of 3,000 flow meters.

The jury awarded the plaintiff four million dollars for the breach of the contract. An amount of $4,000,000.00 is in excess of the amount supported by the evidence.

There was sufficient evidence for the jury to find that the defendant, DMS, agreed to purchase 3,000 flow meters from the plaintiff, Eagle Research. These flow meters were to be subsequently resold to gas well customers, but the mode of communicating between the flow meters and the data gathering source needed to be customized to the customer's individual requirements. The customer's requirements would vary depending on the customer's specific situation. In its Supplement to Plaintiff's Motion to Reconsider, the plaintiff acknowledges this uncertainty when it stated, "The customers would select the method of communication that best suit their needs. Sometimes, the industrial setting required the selection of one method of communication over another. A wireless cell phone option may not work well in some settings."

The issue is how to calculate the price of the various communication options necessary to transmit the data from the flow meters when it is not known to whom these ultimate customers are or their specific needs.

All parties agree that 46 of the flow meters were sold, bought and paid for by Daniel Measurement Services. The damages are based on the failure of DMS to purchase the remaining 2,954 units.

The plaintiff's own evidence is conflicting as to whether these units were to be purchased within one

year or over a five year period. For example, plaintiff's exhibit 62 recites a one year commitment while the punch list in plaintiff's exhibit 113 says that it is a five year commitment.

Several of the plaintiff's exhibits discuss various options and the prices therefore. See plaintiff's exhibits 62, 113, 129, 83 and 255.

Significantly, in exhibit 62, Dave Kimberling, agent of the plaintiff, Eagle Research, e-mailed Mike Johnson and Lee Burkett of the defendant, DMS, In the e-mail, the plaintiff describes certain options and the prices thereof. One price quote is described as "$1,350.00 - Based on your current commitment for 3,000 units during the next 12 months...." Another is described at a price of $1,492.65 per unit, while another is at an even lower price per unit of $1,150.00. The other exhibits describe other price/option possibilities.

Everyone agrees that a functioning unit in the field would need some form of communication at some cost. What were the remaining 2,954 units to cost the defendant when the issue of the communication options and their cost was fluid?

James Butch, President of Eagle, testified as to the plaintiffs' damages for the breach of the contract. He offered the jury plaintiff's exhibit 748 in which his personal notes reflected his calculation of the damages based on a fifty percent profit margin. His calculation recognizes a "Quoted Base Price of Flow Computer: $1,350.00". That quoted base price is consistent with the above quoted e-mail from his employee, David Kimberling who also stated a price of "$1,350.00 - Based on your commitment for 3,000 units during the next 12 months...." Mr. Butch then calculated his loss at $1,993.950.00 based on 2,954

units sold at the base cost of $1,350.00 per unit with a fifty percent profit margin. This is the figure the Court used to reduce the jury's award.

The Court acknowledges that the 3,000 flow meters when installed in the field would need some form of communications so that the data the flow meters collected could be electronically transmitted. Thus, in most instances, the flow meters would need additional communication capability to be field operational. When the evidence is considered in the light most favorable to the plaintiff, it is clear that the jury could have found that the base cost for the 3,000 units was $1,350.00 per unit as testified by Mr. Butch and confirmed in Mr. Kimberling's e-mail. Though the parties agreed to the base price, the issue before the Court is whether there was an agreement for the costs of the communication options or at least a method of calculating the cost of the communication options with reasonable degree of certainty.

The Court further acknowledges that in his testimony Mr. Butch also testified that he anticipated the unbought flow units would also include options at an average price of $1,284.97 per unit. See, the aforesaid plaintiff's exhibit 748. Mr. Butch stated the plaintiffs' damages were $3,891,865.00 based on all 2,954 flow meters costing $2,634.37 per unit ($1,350 base price plus $1,284.96 for options). However, it is worth noting that even this calculation of the damages by the plaintiff's president is less than the four million dollars awarded by the jury. None of the parties can offer with reasonable certainty how the jury calculated and awarded more damages than the plaintiff's president requested.

In his testimony, Mr. Butch reached his conclusion of $1,284.97 for the added cost of options for each of the remaining unsold 2,954 units by calculating the average cost of the communication options for the forty-six units that OMS did purchase from Eagle. The problem with this method of calculation is that it fails the "reasonable certainty test" with respect to the damages Eagle was required to prove. The problem for Eagle is that of the 2,954 units to be ultimately resold by DMS to individual users their individual needs would dictate the ultimate purchase. Only the price of the base unit was firm. The flow meters that Eagle was to build were standard and their cost predictable, but how the flow meter installed in the field would communicate with the data gathering system would vary with each customer. The possibilities remained that DMS would purchase none of the communication options from Eagle; that DMS would purchase all of the options from Eagle; that DMS would purchase some, but not all of the options from Eagle; or, that the ultimate customers would supply their own options depending upon their individual needs and applications. The parties may have agreed to the base price of $1,350.00 per unit, but there was no agreement on the cost of the communication add-ons. Mr. Butch's method of calculating the plaintiff's potential profit for the communication options for the flow computers is precatory speculation, based on averaging from a small, unrepresentative sample of 46 units which DMS bought out of the 3,000 which would have been purchased.

For the reasons herein cited, the Court's ruling on June 15, 2006, to reduce the plaintiff's award for damages on the breach of the contract for the flow

meters is affirmed and the plaintiffs motion to reconsider is denied.

Following the hearing of June 15, 2006, the defendant, DMS, also filed a motion requesting this Court to reconsider its decision to uphold the plaintiff's damage award for the breach of the confidentiality agreement. The plaintiff filed a response. The Court has considered the defendant's motion and the plaintiff's response thereto, but declines to change its ruling as stated at the June 15, 2006 hearing based on the record.

The Clerk of this Court is hereby directed to send a copy of this Order to (1) Ancil G. Ramey, Attorney at Law, Post Office Box 1588, Charleston, West Virginia 25326; (2) Roger A. Decanio, Attorney at Law, 1598 Kanawha Boulevard East, Charleston, West Virginia 25311; (3) William C. Forbes, Attorney at Law, 826 Oakwood Road, Charleston, West Virginia 25314; (4) Michael Moore, Attorney at Law, Post Office Box 2031, Charleston, West Virginia 25327; (5) John L. Tate, Attorney at Law, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202-3352; and, (6) Robert J. McAugham, Jr. Attorney at Law, 3400 JP Morgan Chase Tower, 600 Travis Street, Houston, Texas 77002.

Entered this 3rd day of August, 2006.

/s/_____
O.C. SPAULDING, Judge

APPENDIX D

IN THE CIRCUIT COURT OF PUTNAM COUNTY,
WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. Civil Action No. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC., and
DANIEL MEASUREMENT SERVICES, INC.,

Defendants and Third Party Plaintiff,

v.

JIM BUTCH,

Third Party Defendant.

CORRECTED AMENDED FINAL JUDGMENT ORDER
and
RULINGS ON POST-JUDGMENT MOTIONS

On May 5, 2006, the Court entered an order granting judgment to the plaintiff. The parties then filed written post trial motions. On June 15, 2006, the parties appeared for purposes of oral argument on their various written post-trial motions. The Court announced its ruling in open court on the various motions, but the parties have been unable to agree upon a written order memorializing the Court's oral rulings. Following the hearing of June 15, 2006, the parties filed motions seeking this

Court's reconsideration of certain rulings of the Court announced at the June 15, 2006 hearing. The motions for reconsideration are considered in a separate order entered this date. Accordingly, the Court is of the opinion to and doth hereby order as follows:

1. The "Motion of Plaintiff for a New Trial Pursuant to West Virginia Civil Procedure Rule 59(a) Against Emerson Electric, Inc. and Daniel Industries, Inc., on the Plaintiffs claims for tortious interference with a contract is hereby **DENIED** for reasons stated upon the record.

2. The "Plaintiffs Motion for Attorney Fees" is hereby **DENIED** as the Court finds that the trade secrets counterclaim did not have a material effect on the Plaintiff and for other reason stated upon the record.

3. The Plaintiff's "Motion for Entry of Judgment Including Award of Pre-judgment and Post-judgment" is granted in part and denied in part as follows:

(a) Post-judgment interest on the total final judgment entered herein is granted pursuant to West Virginia Code §56-6-31 from May 8, 2006, the date of entry of final judgment, at the rate of ten percent per annum. The Court notes that this statute was recently amended by Acts of the Legislature effective June 7, 2006, but finds the former version of the statute applicable to this case.

(b) Pre-judgment interest on the Plaintiff's claim for breach of the contract to purchase the 2,954 flow meters is appropriate pursuant to West Virginia Code §56-6-27 because the Plaintiff's submitted this

cause of action founded on contract to the jury and the jury made an award accordingly.

(c) Pre-judgment interest on the Plaintiffs claim for breach of the confidentiality agreement is denied because the Plaintiff did not submit this cause of action founded on contract to the jury and, therefore, waived any claim for pre-judgment interest on this breach of contract claim.

4. The Plaintiff's "Motion for Appointment of a Commissioner" and request for written and other discovery in aid of execution of judgment is **DENIED** as moot in light of the Court's intention to set an appeal bond at the appropriate juncture and for other reasons stated upon he record.

5. The Plaintiffs "Motion for an Appeal Bond" is deferred until the appropriate time.

6. The Plaintiff's "Motion for the Return of Source Code" is **DENIED**, without prejudice, pending a decision by the Defendants regarding reciprocal treatment of each party's source code, and for other reasons stated upon the record.

7. With respect to the jury's damage award of four million dollars regarding the breach of the contract for the purchase of the remaining 2,954 flow meters, even in a light most favorable to the Plaintiff, the evidence supports an award of no more than $1,993,950.00.

Additionally, the jury awarded the Plaintiff pre-judgment interest of $400,000.00 on its award of four million dollars, but that award should be reduced proportionately.

Accordingly, the Court limits the jury's award of four million dollars for the breach of the contract

claim for the 2,954 flow meters to $1,993.950.00 and the jury's award of $400,000.00 for pre-judgment interest on this claim to $199,395.00, and accordingly hereby enters **JUDGMENT** in these amounts against the defendant, Daniel Measurement Services.

8. Further, the Court concludes, for reasons stated upon the record, that it will not set aside the damage award for breach of the confidentiality agreement as sought by the defendant, but enters **JUDGMENT** against the Defendant, Daniel Measurement Services, Inc., in the amount of $10,500,000.00 for breach of the confidentiality agreement.

9. The Court enters **JUDGMENT** in favor of the Plaintiff, Eagle Research Corporation, on the counterclaim of the Defendant, Daniel Measurement Services, Inc., which were withdrawn during trial, in favor of the Third-Party Defendant, Jim Butch, on the third-party claims of the Defendant, Daniel Measurement Services, Inc.; and in favor of the Defendants, Emerson Electric Co. and Daniel Industries, Inc. on the tortuous interference claims of the Plaintiff, Eagle Research Corporation, because the Plaintiff did not file its claim within the statute of limitations as determined by the jury.

WHEREFORE, the Court is of the opinion to and doth hereby enter **FINAL JUDGMENT** in favor of the Plaintiff, Eagle Research Corporation, against the Defendant, Daniel Measurement Services, Inc., in the total amount of twelve million six hundred ninety-three thousand three hundred forty-five dollars ($12,693,345.00).

The Clerk of this Court is hereby directed to send a copy of this Final Order to (1) Ancil G. Ramey,

Attorney at Law, Post Office Box 1588, Charleston, West Virginia 25326; (2) Roger A. Decanio, Attorney at Law, 1598 Kanawha Boulevard East, Charleston, West Virginia 25311; (3) William C. Forbes, Attorney at Law, 826 Oakwood Road, Charleston, West Virginia 25314; (4) Michael Moore, Attorney at Law, Post Office Box 2031, Charleston, West Virginia 25327; (5) John L. Tate, Attorney at Law, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202-3352; and, (6) Robert J. McAugham, Jr. Attorney at Law, 3400 JP Morgan Chase Tower, 600 Travis Street, Houston, Texas 77002.

Entered this 18th day of August, 2006, nonc pro tunc to August 3, 2006.

/s/_____
O.C. SPAULDING, Judge

APPENDIX E

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2007, the following order was made and entered:

Eagle Research Corporation, Plaintiff Below, Respondent

vs.) No. 070375

Emerson Electric Co., Daniel Industries, Inc., and Daniel Measurement Services, Inc., Defendants and Third Party Plaintiffs Below

Daniel Measurement Services, Inc., Petitioner

vs.

Jim Butch, Third Party Defendant Below, Respondent

On a former day, to-wit, February 6, 2007, came the petitioner, Daniel Measurement Services Inc., by Ancil G. Ramey and Hanna B. Curry, Steptoe & Johnson, PLLC; John L. Tate and Jennifer L. Kovalcik, Sites & Harbison, PLLC; Robert J. McAughan, Jr., Locke Liddell & Sapp, LLP; and W. Michael Moore and Rita M. Biser, Moore & Biser, PLLC, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the

Circuit Court of Putnam County, rendered on the 18th day of August, 2006, with the record accompanying the petition. Thereafter, on the 7th day of March, 2007, came the respondent, Eagle Research Corporation, by John E. Sutter, Roger H. Miller, II and Roger A. Decanio, The Sutter Law Firm; and William C. Forbes, Forbes Law Office, its attorneys, and presented to the Court its written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Albright and Benjamin would grant.

A True Copy

Attest: /s/_____
Clerk, Supreme Court of Appeals

APPENDIX F

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2007, the following order was made and entered:

Eagle Research Corporation, Plaintiff Below, Appellant

vs.) No. 33442

Emerson Electric Co., Daniel Industries, Inc., and Daniel Measurement Services, Inc., Defendants and Third Party Plaintiffs Below, Appellees

vs.

Jim Butch, Third Party Defendant Below, Appellee

On a former day, to-wit, February 6, 2007, came the petitioner, Eagle Research Corporation, by John E. Sutter, Roger H. Miller, II and Roger A. Decanio, The Sutter Law Firm; and William C. Forbes, Forbes Law Office, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Putnam County, rendered on the 18th day of August, 2006, with the record accompanying the petition. Thereafter, on the 7th day of March, 2007, came the respondents, Emerson Electric Co., et al., by Ancil G. Ramey and Hanna B. Curry, Steptoe & Johnson,

PLLC; John L. Tate and Jennifer L. Kovalcik, Sites & Harbison, PLLC; Robert J. McAughan, Jr., Locke, Liddell & Sapp, LLP; and W. Michael Moore and Rita M. Biser, Moore & Biser, PLLC, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal.

It is hereby ordered that the above-captioned proceeding be heard, submitted and determined upon the original record, briefs of counsel and oral argument, if requested by the parties.

It is further ordered that the appellant file an original and nine copies of a brief within thirty days of receipt of this order; the appellees to file a like number of briefs thirty days of receipt of the appellant's brief, with any reply brief deemed necessary to be filed within fifteen days of receipt of appellees' brief.

A True Copy

Attest: /s/ _____
Clerk, Supreme Court of Appeals

APPENDIX G

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th of May, 2007, the following order was made and entered:

Eagle Research Corporation, Plaintiff Below, Appellant

vs.) No. 33442

Emerson Electric Co., Daniel Industries, Inc., and Daniel Measurement Services, Inc., Defendants and Third Party Plaintiffs Below, Appellees

Daniel Measurement Services, Inc., Petitioner

vs.

Jim Butch, Third Party Defendant Below, Respondent

On a former day, to-wit, June 12, 2007, came the appellant, Eagle Research Corporation, by John E. Sutter, Robert H. Miller, II and Roger A. Decanio, The Sutter Law Firm, PLLC; and William C. Forbes, Forbes Law Office, its attorney, and presented to the Court its motion in writing to dismiss the above-captioned proceeding for the reasons stated therein. Thereafter, on the 22nd day of June, 2007, came the

appellee, Daniel Measurement Services, by Ancil G. Ramey and Hannah B. Curry, Steptoe & Johnson, PLLC, its attorneys, and presented to the Court its written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion to dismiss. It is therefore ordered, that the above-captioned matter be, and it hereby is, dismissed from the docket of this Court.

A True Copy

Attest: /s/_____
Clerk, Supreme Court of Appeals

APPENDIX H

IN THE CIRCUIT COURT OF PUTNAM COUNTY,
WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. CIVIL ACTION NO. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIEL MEASUREMENT SERVICES, INC.,
and VALTRONICS, INC.,

Defendants,

v.

JIM BUTCH,

Third-Party Defendant.

Proceedings had and testimony taken in the trial of the above-styled action before the Honorable O.C. Spaulding, Judge, and a jury, beginning on Tuesday, the 28th day of March, 2006, and continuing through Wednesday, the 12th day of April, 2006.

* * * *

[Pages 328-336]

* * * *

Q And did you calculate the average options that they bought from those 46 when you reached the number?

A Yeah. It would have been something in the twelve hundred -- we have $1,284 estimated here. So half of that, $642.

Q Times?

A Times 2,954, that's $1,897,000 so the two added together is about $3,891,000. And there's two years lost time too, because we -- there was two years lost time because of the time we put into this project, or roughly two years.

MR. SUTTER: Let me ask madam court reporter if she has a sticker.

MR. TATE: Go ahead and mark it, but may we approach, Your Honor?

Whereupon counsel approached

the bench and the following proceedings were had out of the presence and hearing of the jury:

MR. SUTTER: For the record, I've marked his arithmetic as Plaintiff's Exhibit No. 748.

MR. TATE: I object to the document, Your Honor, it's clearly hearsay. The witness has testified as to what he's done. This document is now hearsay. And I will point out to the Court that it's dated two days ago. It's never been provided to us, clearly created for the purposes of this litigation, and for reasons I don't understand it says CPA Dan Selby at the top, and I object to the introduction of the document. Also there's some information here that hasn't been testified to. Loss of competitive advantage, whatever that is.

MR. SUTTER: First of all, it certainly is not hearsay since the declarant is in Court testifying about it. That has to be -- the declarant not available in Court to cross-examine.

Number two, this is simply arithmetic. He testified to the numbers and how he did them. This is simply the numbers.

THE COURT: So if you already have the evidence, why do you need it in twice?

MR. SUTTER: Because the jury needs, the jury may not, and he said the numbers fast and the jury may not have written them down properly. We've excluded Mr. Selby, we need some way to get our damages into evidence.

THE COURT: I'm with you, but don't you already have that? Didn't he just testify?

MR. SUTTER: He testified to it. This is simply his calculations. All it is is arithmetic. It's like having an expert testify to something and then putting his drawing into evidence.

THE COURT: It's a drawing memorializing what he just told the jury as to how he calculated his damages.

MR. SUTTER: Yes.

THE COURT: And what does CPA Dan Selby that's on there, have to do with that? Is there any testimony to that?

MR. SUTTER: Probably nothing and we will redact that.

THE COURT: And how about at the bottom, I don't know what that is. Loss of -- he's suggesting that there's some other damages that he's due?

MR. SUTTER: He will testify as far as the loss of competitive advantage.

THE COURT: Well, he hasn't yet.

MR. SUTTER: Yes.

THE COURT: So I'm not going to let it in yet. Okay. I will tell you that I will admit it over the objection, provided (1) you redact out the CPA stuff. That gives it some authenticity that doesn't exist.

MR. SUTTER: I understand.

THE COURT: (B) you're going to have to account for all the information in there. I mean, and specifically I'm dealing with that last issue, I don't know what that means, and competitive advantage thing. You accomplish that, I'll admit it over the objection of the defendant.

MR. SUTTER: Can we take a break? We've been going for an hour.

THE COURT: Well, it depends on how close you are to finishing with him. Can you give me a read on that?

MR. SUTTER: Pretty close.

THE COURT: See, in some respects I"d love for you to be able to finish, give him a break, before we turn him over to Mr. Tate. If you're getting close to finishing, I"d like for you to go ahead and finish up.

MR. SUTTER: I'll try to do that.

THE COURT: Can you give me a rough idea?

MR. SUTTER: Ten, fifteen minutes.

THE COURT: That would work out a little bit better. That will get us down to 3:15, 3:20, we could break then.

MR. SUTTER: Would you want to inquire about the diabetic, if he wants to take a break?

THE COURT: I don't want to.

Whereupon counsel returned to counsel tables, where the proceedings were resumed in the presence and hearing of the jury as follows:

BY MR. SUTTER:

Q Mr. Butch, as a result you contend that Emerson and DMS and Daniel breached the confidentiality agreement, correct?

A Yes.

Q What damages, if any, have you incurred as a result of the breach of the confidentiality agreement?

MR. TATE: Objection, Your Honor, speculation, lack of foundation.

THE COURT: How do you compute it? What's it based on? Give a foundation.

MR. SUTTER: Let me rephrase the question.

Q Is it your contention that Emerson copied your computer and made a competing computer from that?

A It's my contention --

MR. TATE: Objection, Your Honor, lack of foundation.

THE COURT: Okay. Start the who, what, when, where, why kind of questions, okay, as opposed to telling him what his contention is, so he can just affirm. Okay. No leading question. Open ended question. And then I'll allow you to follow up.

MR. SUTTER: Part of the problem is -- I don't want to -- Some of the evidence hasn't come in yet that will come in with Mr. Johnson. I could give him a hypothetical.

THE COURT: We're talking about, I take it, the information that's at the bottom of that document?

MR. SUTTER: Yes.

THE COURT: And he has an opinion, does he not, does your client have an opinion that he wishes to give at this time as to what's at the bottom of that document?

MR. SUTTER: Yes.

THE COURT: And does he have a basis to give that opinion?

MR. SUTTER: Just his own business experience.

THE COURT: So establish the foundation. Show me that he knows that business, he knows the loss, and he would have an opinion as to what the loss would be.

MR. SUTTER: May I approach, Your Honor?

Whereupon counsel approached the bench, where the following proceedings were had out of the hearing of the jury:

MR. SUTTER: He will testify that he is -- he's not going to testify about a number. He's going to testify that he lost a competitive advantage in the market place because his competitor produced an identical machine. Now, he can't testify to their profits because that's -- he doesn't know that. They've produced what their profits were, and I intend to enter that into evidence later in this.

But putting that aside, I believe that a loss of competitive advantage, while it's not quantified, is an element of damages in a breach of contract -- I mean breach of confidentiality claim, and he's going to testify generally as to how far it set his business back.

MR. TATE: Your Honor, number one, this is all brand new stuff. Mr. Butch has testified into five volumes of sworn testimony. He's never been identified as an expert on the loss of competitive advantage. I have no idea what he's going to say that the "loss of competitive advantage" is, or what methodology -- if we may for a moment consider that he's an un-designated expert -- what methodology he intends to use to develop this, number one.

Number two, what the heck is loss of competitive advantage? Where is that as an element of damage of any cause of action that the plaintiff has advanced? Where is the law that says that they have a damage, a cause of action for that particular damage category? How is it measured? What does the law say it requires as a showing for evidence?

Number three, there's been no foundation established for this alleged stolen computer. The only thing we have in this case is Mr. Decanio's opening statement. Mr. Butch is an electrical engineer who's the president of this company and they have not asked him a single question about the technology that he contends is in the Fisher FloBoss. How in the world can this man testify that he's lost a competitive advantage about --

MR. SUTTER: Let me --

MR. TATE: Excuse me -- about something that has never been identified, which one might presume

he is qualified to testify about since it's electrical engineering on his product. But instead, the plaintiff proposes to bypass that completely and use Mr. Butch --

MR. SUTTER: I could short circuit your argument.

MR. TATE: -- use Mr. Butch as an expert on something called the loss of competitive advantage under the law.

MR. SUTTER: First of all, Your Honor, my problem is much of my foundation is going to come through, as far as the facts, what happened, through Professor Nutter's testimony as an expert, Mike Johnson and Lee Burkett. With that foundation I believe he can, and to short circuit this whole thing, if I would be allowed to recall him for the sole purpose of establishing his damages after those witnesses testify, it would probably solve the problem.

MR. TATE: He can recall his client any time he wants, Your Honor. After I cross-examine him, he can put him back on the stand if he wants to.

MR. SUTTER: But that way we have a foundation.

MR. TATE: But I think otherwise we're completely adrift here in terms of this witness testifying on this topic that we've never heard before and that he's not been qualified.

THE COURT: Okay, I will agree then to allow you during your case-in-chief to recall Mr. Butch solely for the purpose of testifying as to what is a competitive advantage, how that comes about, what the heck it is. Lay the foundation, assuming you

have at that time already established through evidence of Mr. Nutter or somebody that this device was purloined by somebody else and that they lost something.

MR. SUTTER: Fine. Your Honor, we've taken up a lot of time here and I might have another ten minutes.

THE COURT: We'll quit then. I was hoping to kind of complete with this witness, but we're not.

Whereupon counsel returned to counsel table, where the proceedings resumed in the hearing of the jury as follows:

THE COURT: Members of the jury, then we'll take a break at this time. Do not discuss the facts of this case. We'll return to the courtroom shortly.

Whereupon the jury was excused from the courtroom, where the proceedings resumed out of the presence and hearing of the jury as follows:

THE COURT: Now, we will stand in recess. You may not discuss with your client at all. During the break normally your lawyer wouldn't be allowed to confer with you in the middle of your testimony, so this is no different. You . . .

* * * *

Thursday, April 6, 2006

[Pages 1586-87]

* * * *

. . . were clear enough under the rules for notice pleading. It's always better to be more precise.

THE COURT: Okay. Next issue.

MR. MILLER: Your Honor, on Paragraph 7 -- I'm sorry, Page 7, in regard to when a cause of action accrues, we have certainly the appropriate language concerning when the plaintiff should become aware using reasonable diligence, but I believe it's a two pronged test for the discovery rule. One is knowing or should have known when the plaintiff has been injured; and the second element is knowing or should have known the identity of the wrongdoer. I think we need an additional sentence that includes that second element as to the identity of the wrongdoer.

Okay. Now, turn to Page 8, last full paragraph. While we don't have any problems with the Court's fair, adequate compensation for such loss of damage, we believe that it's also appropriate to go into a little bit more detail in regard to the damages which the plaintiff is claiming. And we would like the Court to also include in its charge our instruction concerning lost profits of the plaintiff arising from the breach of the purchase agreement for the 3000 flow computers and also the recovery of the defendant's profits for the breach of the confidentiality agreement. Those would be previously proffered Instructions 30-A and 30-B, which again because we've given you so much paper, I can provide you with my two somewhat messy copies if you'd like, Your Honor.

THE COURT: It would be a help.

MR. MILLER: 30-A pertains to lost profits for breach of the contract for sale of the 3000 flow computers. 30-B is for the breach of the confidentiality agreement. One issue too --

MR. TATE: For the record, Your Honor, we object to those.

THE COURT: I'm going to come back.

MR. TATE: It's simple just to say we don't think that's appropriate. That's all I need to say at this point.

MR. MILLER: Your Honor, we have the requirement too in a contract case -- I never really understood this rule, but it's by statute -- in order for there even to be the possibility to obtain prejudgment interest in a contract case, the jury has to be instructed as to the possibility of that element.

THE COURT: We can't in a contract case, we can't -- the Court can't add it?

MR. MILLER: No, sir, not according to my reading of the Thompson v. Stuckey case. And so therefore we believe it is incumbent on us to ask the Court to provide an instruction in regard to prejudgment interest in a contract case. If we . . .

* * * *

Tuesday, April 11, 2006

[Pages 1626-27]

* * * *

. . . prohibits its unauthorized use. A breach of the confidentiality agreement occurs when a party acts in a manner prohibited by the confidentiality agreement.

In deciding whether the mutual confidentiality agreement was breached, you should look to the terms of the agreement itself to determine the type of information that could or could not be disclosed, and to determine to whom the information could be disclosed.

Unless a term in the agreement is given a particular meaning in the agreement, words used by

the parties in the agreement should be given their ordinary, usual and popular meaning. If a term is ambiguous or uncertain, but the parties by their conduct have placed a construction upon the term which is reasonable, you may likewise apply the same meaning to the term as the parties have demonstrated by their conduct.

Therefore, in order for the plaintiff, Eagle Research, to prevail, you must find by a preponderance of the evidence that the defendants breached the parties' confidentiality agreement by either improperly disclosing the confidential information learned pursuant to the confidentiality agreement and/or improperly using confidential information learned pursuant to the confidentiality agreement.

If you find by a preponderance of the evidence that the defendant, DMS, breached the confidentiality agreement entered into by Eagle Research and DMS, then you may award damages in an amount of money which fairly compensates Eagle Research to the extent possible for reasonably ascertainable losses proximately caused by the breach.

In its third cause of action, the plaintiff, Eagle Research, alleges that defendant Emerson Electric, and/or Daniel Industries tortiously interfered with both of the alleged contracts between Eagle Research and the defendant, Daniel Measurement Services. That is, the plaintiff claims that the defendants tortiously interfered with their alleged contract for the purchase of the 3000 flow computers and the parties' mutual confidentiality agreement.

Tortious interference with a contract is a tort claim and is not a claim in and of itself for the breach

of a contract. However, before you may consider a tort claim for the tortious interference with a contract, you must in the first instance believe that a contract actually exists.

Tortious interference with a contract is committed when a contractual or business relationship is intentionally interfered with by a party outside such relationship, and the interference causes harm to the relationship. In order to determine whether an actor's conduct in intentionally interfering with a contract of another is improper or not, consideration may be given to the nature of the actor's . . .

* * * *

APPENDIX I

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. CIVIL ACTION NO. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIEL MEASUREMENT SERVICES, INC.,
and VALTRONICS, INC.,

MOTIONS HEARING had in the above-styled action before the Honorable O.C. Spaulding, Judge, on Thursday, the 16th day of March, 2006.

* * * *

[Pages 138-40]

* * * *

. . . hired Lee Burkett as his personal employee is outside of the facts and outside of the evidence in this case, completely wrong, making up an argument. It's spinning the yarn and it's not applicable here.

Mr. Butch should get granted summary judgment because he did not breach a duty to anybody. In fact, he met his duty to his company and that goes for Eagle Research as well.

What can they do with this information? They have to go to an attorney and bring it before you, Your Honor, respectfully, bring it before the people of Putnam County to determine what these bad acts really were, let them decide. That's why this was brought up. That's why it was taken to an attorney. There was nothing wrong here. They did nothing wrong. No breach whatsoever, legal or otherwise.

THE COURT: Okay. Gentlemen, let's take them up one at a time. Let me make an opening comment. Mr. Tate, I'm going to deal with all motions for summary judgment. You started out the day trying to impress me with academic credentials of the defense team in this case and I'm sure that's going to play well with the Putnam County jury here as well as it played with me. Let me tell you, I'm sure you have done your homework, and if you've done your homework you've done your homework on me and you'll know what my reversal rate is. And I will tell you in the field of civil law, civil litigation, the only time I've ever been reversed in 14 years is when I grant summary judgment. There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed. Not every time literally, but that's where it is. Our system favors taking it to a jury. And I'm going to allow all of these to go to a jury. Plain and simple. All of your's, all of the plaintiff's. Even the individual one against Mr. Butch. I don't know how you all are going to argue all of this and present all this to a jury. That will be your problem.

Let me give you one forewarning, if I can, Mr. Decanio, that, you know, your argument on accord

and satisfaction, you know, just read the letter, takng out the parentheses. This is from Mr. Milliken. "I agreed to pay the in-house invoices in consideration that no more shipments, related invoices, nor any other future charges incurred by your company or supply line expenses to your company will be billed to Daniel Measurement Services."

Boy, that's a sure strong statement to me that Daniels viewed that as end of the deal. Here's our money, take it. Pretty strong statement. And I'm sure you're going to hear that and the jury is going to hear that.

Having said that, let's go to, let's quickly get through all of our motions on evidence.

All right, I got defendant's designation of fact witnesses file by James Butch. You essentially say "Judge, you're trying to get in the back door what you've prohibited in the front door." I got no response from Mr. Decanio. I take it you agree?

MR. DECANIO: No, Your Honor. I tried to respond to everything in this case. The Order, first of all the Amended Complaint and the Order granting defendants' claim against Jim Butch individually occurred after the deadline of the fact witness disclosure. Accordingly he's entitled to a defense. It's our position that Mr. Butch as an individual, who wasn't a party to the original Scheduling Order should be entitled to bring some of the witnesses he feels are important for his defense and the way I think that he should be allowed to do so.

THE COURT: Your reply?

MR. MOORE: Your Honor, I'll reply to that issue as there's an aiding and abetting claim against Mr. Butch. None of these witnesses they want to call that were previously excluded by the Court in the November 4th hearing have any relationship or relevance to that third-party claim for him to call them individually. For instance, the identities of the . . .

* * * *

APPENDIX J

SUPERCONFIDENTIAL

Use and Disclosure Restricted by Order of the Putnam County Circuit Court of West Virginia, Civil Action No. 03C119

NOT TO BE FILED UNLESS UNDER SEAL

YEAR	PRODUCT	NUMBER OF UNITS SOLD	AVERAGE UNIT SALES PRICE	AVERAGE UNIT COST TO PRODUCE
1999	FloBoss 103	0	$0	$0
1999	FloBoss 104	0	$0	$0
2000	FloBoss 103	0	$0	$0
2000	FloBoss 104	0	$0	$0
2001	FloBoss 103	0	$0	$0
2001	FloBoss 104	0	$0	$0
2002	FloBoss 103	456	$877	$570
2002	FloBoss 104	0	$0	$0
2003	FloBoss 103	1,985	$1,339	$829
2003	FloBoss 104	90	$2,167	$1,341
2004	FloBoss 103	2,889	$1,685	$991
2004	FloBoss 104	44	$2,386	$1,105
2005 (partial)	FloBoss 103	3,554	$1,661	$957
2005 (partial	FloBoss 104	115	$1,904	$857

Plaintiff's Exhibit

700

APPENDIX K

FLOWBOSS 103 AND 104 PROFITS

FB 103

YEAR	PRICE	MARGIN	UNITS SOLD	PROFIT
2002	$3500	x .45	456	$718,200
2003	$3500	x .45	1985	$3,126,375
2004	$3500	x. 45	2889	$4,550,175
2005	$3500	x .45	3554	$5,597,550
			TOTAL	$13,992,300

FB 104

YEAR	PRICE	MARGIN	UNITS SOLD	PROFIT
2002	$2900	x .45	0	$0
2003	$2900	x .45	90	$117,450
2004	$2900	x. 45	49	$57,420
2005	$2900	x .45	115	$150,075
			TOTAL	$324,945

GRAND TOTAL PROFITS: $14,317,245

FB 103 Price quoted as $3500
FB 104 Price quoted as $2800-$3000

Plaintiff's Exhibit F

APPENDIX L

**IN THE CIRCUIT COURT OF PUTNAM COUNTY,
WEST VIRGINIA**

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. **Civil Action No. 03-C-119**
Judge Spaulding

**EMERSON ELECTRIC CO., et al.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT SERVICES, INC.,
and VALTRONICS, INC.**

Defendants.

v.

JIM BUTCH

Third Party Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANTS, MOTION TO SET ASIDE THE VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL

* * * *

II. DEFENDANTS' MOTION ON THE MUTUAL CONFIDENTIALITY AGREEMENT SHOULD BE DENIED

* * * *

C. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S AWARD OF $10,500,000.00.

The Defendants argue that the damages sustained as a result of the breach of the Mutual Confidentiality Agreement is "mere speculation or conjecture" and even went further, claiming there was "no evidence or testimony whatsoever." Yet again, the Defendants are patently wrong.

Defendants' counsel generated and produced in discovery a chart pertaining to the number of units sold, average sales price and profits for the FB103 and FB104. This was shown to Randy Page during his cross examination. In a shocking admission, Randy Page testified that these numbers were low. **Plaintiff's Motion Exhibit E.**

Based on Randy Page's admission of artificially low numbers in the document generated by Defendant's counsel, Plaintiff then created a demonstrative exhibit that was consistent with Mr. Page's testimony at trial. **Plaintiff's Motion Exhibit F.**

In **Plaintiff's Motion Exhibit F**, Defendants total profits for Emerson's FB103 was $13,992,300.00. The total profits for Emerson's FB104 was $324,945.00. Although Plaintiff does not know for certain how the jury arrived at the final amount, it appears that the jury may have extracted the unjust enrichment of Defendants and rounded

down the number to $10,500,000.00, relying upon **Plaintiff's Motion Exhibit F.**

Paragraph E of the Mutual Confidentiality Agreement specifically allows for damages, which include equitable remedies in addition to "any other remedies." Eagle 121 **Plaintiff's Trial Exhibit 45.**

It is proper in contract damages to disgorge unjust enrichment for breach of a non disclosure agreements such as in this case. The Court in *Ajaxo v. E*Trade Group, Inc.* 135 Cal.App.4th 21, 37 Cal.Rptr.3d 221 (2006) held that extracting Defendants' unjust enrichment was proper compensation for breaching a non disclosure agreement. *Id.* at 56-57. At issue in this case, was the breach of a non disclosure agreement of wireless stock trading technology. The Court endeavored to put the Plaitiff in as good as position as he would have occupied had the non disclosure contract been performed. *Id.* at 55-56. The Court explained that unjust enrichment is used synonymously with restitution. When the party in that case breached the non disclosure agreement, it should make restitution. *Id.*, citing 1 Corbin on Contracts (revised edition) § 1.20, p.63. Like the non disclosure agreement in this case, it allowed equitable restitution in addition to other damages at law. The Court further stated as follows:

> The remedy of restitution differs from the remedy in damages in that awarding damages the purpose is to put the injured party in as good a position as he would have occupied, had the contract been fully performed, while in enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and thus tend

> to put the injured party in as good a position as that occupied by him before the contract was made. Originally restitution requires that the defendant shall give something back to the plaintiff; and it may supposed that the defendant cannot do this unless he has received something of value at the plaintiff's hands.
>
> *Id.* at 56, citing 12 Corbin on Contracts (Interim Edition) § 1107, p.24

Plaintiff may recover what it lost, its technology, by recovering the profits Defendants gained as a result of the breach of the Mutual Confidentiality Agreement. Other Courts have also measured the value of what the Plaintiff lost by measuring what the defendants gained as a result of the breach of a confidentiality agreement. For example, the Court in Saforo & Associates, Inc., GEO v. Porocel Corp., 337 Ark. 553, 991 S.E.2d 117 (1999) permitted damages to be calculated by either plaintiff's lost profits or by defendant's gain, but not both. See also *Carbo Ceramics, Inc., v. Keefe*, 2006 WL 197340 (5th Cir., Tex).

Similarly, Eagle conferred a benefit on DMS, and unknowingly its parent company, by sharing its technology. When DMS breached the Mutual Confidentiality Agreement, then Defendants received a benefit to keep it competitive without compensating Eagle. It created a smaller, cheaper, more functional product, the FB 103 and 104 computers. Defendants destroyed of the value of the discovery of Eagle's flow computer and mitigated the advantage Eagle had in technology and functionality by unfair means. Defendants obtained the desired knowledge of Eagle's technology without paying the

price in labor, money, or machines expended by Eagle, thereby unjustly enriching themselves. Eagle must be compensated for DMS's breach by disgorging its unjust enrichment. Accordingly, there was reasonable evidence for the jury to base its damages. Defendants' motion should be denied.

* * * *

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No. 07-384

FILED

OCT 22 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DANIELS MEASUREMENT SERVICES, INC., a Texas Corporation,

Petitioner,

v.

EAGLE RESEARCH CORPORATION, a West Virginia Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Circuit Court Of Putnam County, West Virginia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a breach of contract case, does a jury's award of compensatory damages based on the profits earned as a result of the breach, violate the Due Process Clause of the Fourteenth Amendment?

2. In a breach of contract case, does the Due Process Clause of the Fourteenth Amendment guarantee appellate review of a state court jury verdict by this Court when the trial court denied the defendant's post-trial motions?

3. In a breach of contract case, does the Due Process Clause of the Fourteenth Amendment guarantee appellate review of a state court jury verdict by this Court, when the state appellate court reviewed the defendant's petition for appeal and denied the petition after considering the parties' written submissions and oral argument?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Rule 29.6, respondent, Eagle Research Corporation was the plaintiff below and is a "C" Type West Virginia Corporation. There are no parent corporations nor does a publicly traded company own any of its shares.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED	2
COUNTER-STATEMENT	2
REASONS FOR DENYING THE PETITION	8
I. There Is No Precedent For This Court's Review Of The Jury's Award For Compensatory Damages Against DMS	8
II. Assuming That DMS Has A Federal Constitutional Right For The Procedural Review Of The Judgment Rendered Against It, DMS Received The Process It Was Due When It Exhausted Its Post-Trial Remedies In The Trial Court, And When It Argued Its Petition For Appeal In The State Appellate Court	12

TABLE OF CONTENTS – Continued

Page

III. The Trial Court's Refusal To Give Plaintiff's Instruction 30-B Is Not A Proper Basis For This Court's Review Of The Jury's Verdict 14

IV. Any Alleged Error Arising From A Jury Verdict Based On The Defendants' Profits Was Waived By DMS At Trial 15

V. This Court Should Not Grant The Petition Based On The Fact That Appellate Review Of Civil Cases In West Virginia Is Discretionary 16

VI. This Court Should Not Grant The Petition Based On The Trial Court's Statements Concerning Summary Judgment 17

VII. Assuming That DMS Has A Federal Constitutional Right For Substantive Review Of The Judgment Rendered Against It, The Evidence Admitted At Trial Was Sufficient To Support The Jury's Verdict 18

CONCLUSION 27

APPENDIX

A. Mutual Confidentiality Agreement Dated June 30, 1999 ..... App. 1

B. Civil Charge. Dated April 13, 2006 ..... App. 10

C. Civil Charge ..... App. 11

D. Direct Examination of James Butch. Dated March 28, 2006 ..... App. 12

TABLE OF CONTENTS – Continued

Page

E. **Plaintiff's Exhibit 62:** Confirmatory E-Mail regarding the Purchase Contract for 3,000 units. Dated August 26, 1999 ..... App. 14

F. **Cross-Examination of James Butch.** Dated March 28, 2006..... App. 17

G. **Plaintiff's Exhibit 748.** Purchase contract damages of Eagle Research Corp. .... App. 20

H. **Direct Examination of James Butch.** Dated March 28, 2006..... App. 21

I. **Direct Examination of Dr. Roy Nutter.** Dated April 2, 2006 ..... App. 23

J. **FlowBoss 103 and 104 Profits.** Chart derived from testimony of Randy Page, Defendant's Corp. Representative at trial..... App. 25

K. **Excerpt from Plaintiff's Closing Argument** ..... App. 26

L. **Damages for Breach of Confidentiality Agreement.** Plaintiff's Instruction No. 30-B and transcript from a hearing during trial on instructions ..... App. 28

M. **Hearing on the Instructions.** Dated April 6, 2006..... App. 30

N. **Hearing on the Instructions.** Dated April 11, 2006 ..... App. 33

O. **Order from Rory L. Perry, II, Clerk of the West Virginia Supreme Court of Appeals.** Dated May 22, 2007 ..... App. 35

TABLE OF CONTENTS – Continued

Page

P. Order from Rory L. Perry, II, Clerk of the West Virginia Supreme Court of Appeals. Dated May 22, 2007 ..... App. 37

Q. Direct Examination of Randy Page. Dated April 3, 2006 ..... App. 39

R. Plaintiff's Exhibit 592: E-Mail from a former DMS Vice President, Michael Johnson regarding the Confidentiality Agreement between DMS and Eagle Dated February 24, 2000 ..... App. 46

S. Excerpt from Defendants' Petition for Appeal to the West Virginia Supreme Court of Appeals. Comment by defendants where they state that Eagle's cause of action for breach of the confidentiality agreement was a "functionally-identical claim" to Eagle's trade secret claim. Dated February 5, 2007, page 17 ..... App. 52

TABLE OF AUTHORITIES

Page

CASE LAW

*Ajaxo v. E*Trade Group, Inc.*, 135 Cal. App.4th 21, 37 Cal. Rptr.3d 221 (2006) 25, 26

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) 9, 10

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 10, 11

Carbo Ceramics, Inc., v. Keefe, 166 Fed. Apex. 714, WL 197340 (5th Cir. 2006) 24

Chafin v. Gibson, 213 W. Va. 167, 578 S.E.2d 361 (2003) 17

Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co., 152 U.S. 200, 14 S.Ct. 523, 38 L.Ed. 411 (1894) 20

Dunbar Fraternal Order of Police, Lodge # 119 v. City of Dunbar, 218 W. Va. 239, 624 S.E.2d 586 (2005) 17

Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) ... 9, 10

Jackson v. State Farm Mut. Auto. Ins. Co., 215 W. Va. 634, 600 S.E.2d 346 (2004) 17

Murphy v. Lifschitz, 183 Misc. 575, 49 N.Y.S.2d 439 (Sup. Ct. N.Y. County 1944) *aff'd mem.* 268 A.D. 1027, 52 N.Y.S.2d 943 (1st Dep't) *aff'd mem.* 294 N.Y. 892, 63 N.E.2d 26 (1945) 20, 22, 23

Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994) 17

TABLE OF AUTHORITIES – Continued

Page

Smith v. Holloway, 169 W. Va. 722, 289 S.E.2d 230 (1982) 16

State v. Browning, 199 W. Va. 417, 285 S.E.2d 383 (1989) 16

State Farm v. Campbell, 538 U.S. 408 (2003) 9, 10

Strahin v. Sullivan, 647 S.E.2d 765 (W. Va. 2007) 17

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) 8, 9, 10, 13

University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518 (5th Cir. 1974) 24, 25

U.S. Naval Institute v. Charter Communications, Inc., 936 F.2d 692 (2nd Cir. 1991) 20, 21, 22, 23

West Virginia Fire & Cas. Co. v. Stanley, 216 W. Va. 40, 602 S.E.2d 483 (2004) 17

Wimer v. Hinkle, 180 W. Va. 660, 379 S.E.2d 383 (1989) 15, 16

CONSTITUTION

U.S. Const. amend. XIV, § 1 2

RULES

W. Va. R. App. P. 5(a) 13

W. Va. R. App. P. 10(f) 8

W. Va. R. Civ. P. 56 17

TABLE OF AUTHORITIES – Continued

Page

OTHER SOURCES

5 Corbin On Contracts § 1002, at 31 (1964)..... 20

Restatement (Second) of Contracts § 347 (1981)..... 20

Restatement (Second) of Contracts, § 352 (1981) ... 21, 23

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Eagle Research Corporation ("Eagle") respectfully submits this response to Petitioner Daniel Measurement Services, Inc.'s ("DMS") petition for a writ of certiorari to review the judgment of the Circuit Court of Putnam County, West Virginia.

OPINIONS BELOW

The orders of the Circuit Court denying DMS' motions for judgment as a matter of law, for a new trial, and for reconsideration, are unreported. The orders of the West Virginia Supreme Court of Appeals denying DMS' petition for discretionary review and dismissing Eagle's appeal are also unreported.

JURISDICTION

The Circuit Court entered final judgment and denied reconsideration on August 18, 2006. The West Virginia Supreme Court of Appeals denied DMS' petition for appeal on May 22, 2007, but granted Eagle's cross-petition for appeal. On June 12, 2007, Eagle moved to dismiss its appeal. The West Virginia Supreme Court of Appeals granted Eagle's motion on June 27, 2007.

On September 19, 2007, DMS filed its petition for a writ of certiorari. DMS invokes the jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. amend. XIV, § 1.

COUNTER-STATEMENT

This case does not involve an important issue of constitutional civil procedure. The jury's award of ten million, five hundred thousand dollars ($10,500,000.00) for breach of the confidentiality agreement is based on sufficient evidence of record. Resp. App. 1a-9a. Also, the trial court's instruction concerning damages, while not the instruction proposed by Eagle, was a sufficient basis for the jury's verdict. Resp. App. 10a-11a.

The trial court did not abdicate its duty to review the verdict. The defendants filed post-trial motions for judgment notwithstanding the verdict, and in the alternative, for a new trial. Those motions were

briefed extensively, and the trial court heard oral argument on the motions as well. DMS, while contending that the trial court completely failed in its duty to review the jury's verdict, omitted the fact that, on one post-trial motion, the trial court, *sua sponte*, gave the defendants m ch more relief than what they sought.

Before DMS breached the contract for the purchase of three thousand (3,000) flow computers from Eagle, Eagle provided approximately forty-six (46) computers to DMS. DMS paid for those computers. However, the jury's verdict of four million dollars ($4,000,000.00) in lost sales included those flow computers for which DMS had already paid. One of the defendants' post-trial motions sought a reduction of the four million dollar ($4,000,000.00) judgment as a result of the prior payments. The prior payments totaled three hundred, twenty-five thousand, nine hundred, and eighty-one dollars and twenty-three cents ($325,981.23.)

During the hearing on the defendants' post-trial motions, the trial court, on its own, began questioning the sufficiency of the evidence regarding add-ons, such as communication devices, to the basic flow computer. See Appendix C of DMS' Petition citing the trial court's order. After extensive argument on this issue, the trial court reduced the verdict for breach of the purchase contract by two million dollars ($2,000,000.00.) This amount represented the costs of the add-ons, which the trial court found DMS had not necessarily agreed to purchase for all three thousand

(3,000) flow computers. It is clear from the trial court's *sua sponte* reduction of Eagle's damages by two million dollars ($2,000,000.00) that the trial court did not abdicate its duty to review the jury's verdict.

When DMS solicited proposals from manufacturers of flow computers, DMS did not ask bidders to "assume" that it would purchase three thousand (3,000) flow computers annually. DMS told Eagle that DMS was looking at three thousand (3,000) units per year. Resp. App. 12a-13a. When asked by Eagle whether the first year's three thousand (3,000) units would be a firm commitment, DMS replied that it was. Resp. App. 12a-13a. The jury found that DMS did, in fact, commit to the purchase of three thousand (3,000) flow computers. Resp. App. 14a-16a.

The e-flow computer project did not fail as DMS claims. DMS had already purchased forty-six (46) flow computers from Eagle. Resp. App. 17a-19a. DMS received a quote from one customer for three thousand (3,000) units. Resp. App. 18a. Another order from Texaco called for two hundred units. Any failure of the project was the result of DMS breaching the purchase contract with Eagle for three thousand (3,000) flow computers. Resp. App. 19a.

DMS' assertion that there is no evidence in the record which could sustain a four million dollar ($4,000,000.00) award for breach of the purchase contract is not correct. At trial, the President of Eagle testified that each flow computer had a base price, with an additional price for add-on communication

devices. Based on the prices for the two thousand, nine hundred, fifty-four (2,954) remaining flow computers which DMS refused to buy, Eagle's reasonably ascertainable losses for breach of the purchase contract totaled almost four million dollars ($4,000,000.00.) Resp. App. 20a.

DMS did not pay Eagle one hundred thirty-eight thousand dollars ($138,000.00) "to settle all outstanding charges" as DMS claims. DMS paid one hundred thirty-eight thousand dollars ($138,000.00) to Eagle for outstanding invoices for purchases from Eagle totaling that amount. Resp. App. 21a-22a.

After Eagle dropped its claim for misappropriation of trade secrets claim, Eagle was later provided with the defendants' model numbers FB 103 and FB 104 flow computers. Dr. Roy Nutter, Eagle's expert in engineering, discovered that the FB 103 and FB 104 computers were modeled after Eagle's flow computer. The defendants did not offer any evidence to rebut this testimony. Resp. App. 23a-24a.

DMS' assertion that there is no evidence in the record that could possibly sustain the ten million five hundred thousand dollar ($10,500,000.00) award is not correct. The evidence submitted at trial was sufficient to establish Eagle's reasonably ascertainable loss for breach of the confidentiality agreement. Evidence was presented showing Emerson's profits from the sale of flow computers, which Dr. Nutter found to be identical to Eagle's flow computers. At trial, Eagle argued that profits of the defendants are

evidence of Eagle's reasonably ascertainable losses. Resp. App. 25a-27a.

DMS states that the profits in question were profits from a non-party subsidiary of DMS' parent company. This statement is also not correct. After DMS gave Eagle's protected technology to Emerson, Fisher-Rosemont, a division of Emerson, not a subsidiary of Emerson, earned profits from the sale of flow computers which were identical to Eagle's flow computer. Because Fisher-Rosemont was part of the Emerson Corporation, and not just a subsidiary, Fisher-Rosemont's profits are Emerson's profits. These profits were determined by documents provided by Defendant Emerson during the discovery phase of the litigation. See Pet. App. J. The amount of Emerson's profits was revised based on the testimony at trial from Randy Page, an employee of Emerson. Resp. App. 25a; 39a-45a. The profits of Emerson, through Fisher-Rosemont, are related to DMS' breach of the confidentiality agreement because the profits arose from Emerson's sale of flow computers which were identical to the flow computers Eagle sold to DMS.

Emerson obtained Eagle's technology from DMS and made profits from the sale of computers which were copies of Eagle's flow computers. Eagle did not base its claim for damages on the disgorgement of the defendants' profits. Rather, Eagle argued at trial that Emerson's profits from sales of flow computers, which were identical to Eagle's flow computers, was evidence of Eagle's loss arising from the breach of the confidentiality agreement. Resp. App. 25a-27a; 39a-45a.

DMS' statement that Eagle never objected to the trial court's instruction on the basis of an award for damages for breach of the confidentiality agreement is also wrong. Eagle submitted an instruction, Plaintiff's Instruction No. 30-B, which stated that the respondent's breach of contract damages could be based on the plaintiff's lost profits, or the defendant's profits arising from the breach, whichever was greater. After the trial court presented the parties with its proposed charge to the jury, Eagle argued to the court that the instruction concerning damages for breach of contract should include the language contained in Plaintiff's Instruction 30-B. Resp. App. 28a-32a. The trial court rejected this instruction a second time. Before instructing the jury, however, the trial court noted the parties' exceptions to the trial court's rejection of any proposed instructions. Resp. App. 33a-34a.

DMS submits that the jury's award is based on a theory on which it was never instructed. This statement is not correct. The trial court instructed the jury that it could award damages based on the plaintiff's reasonably ascertainable losses. In closing argument, plaintiff argued that plaintiff's losses could be based on the profits which the defendants earned as a result of the breach. The respondent did not object to this argument. The award in this case is properly based on the trial court's instructions to the jury. The instruction by the trial court was a correct statement of the law and a sufficient basis for the verdict.

DMS asserts that the West Virginia Supreme Court of Appeal's unanimous vote to grant Eagle's

petition for appeal on the trial court's reduction of the purchase contract damages by two million dollars ($2,000,000.00) provided a means for DMS to cross-assign as error the ten million five hundred thousand dollar ($10,500,000.00) damage award. While W. Va. R. App. P. 10(f) does not delineate the scope of cross-assignments of error, it is highly unlikely that the West Virginia appellate court would allow DMS to argue a second time the same assignments of error which the court previously rejected.

REASONS FOR DENYING THE PETITION

I. THERE IS NO PRECEDENT FOR THIS COURT'S REVIEW OF THE JURY'S AWARD FOR COMPENSATORY DAMAGES AGAINST DMS.

DMS has not cited any cases holding that it has a federal constitutional right to have this Court determine whether the state court verdict against it is supported by the evidence. DMS has also failed to cite any cases which suggest that it has a federal constitutional right to have this Court determine whether the compensatory damages awarded against it are reasonable. DMS has failed to cite a case in its favor on these issues because no such case exists.

DMS quotes Justice Scalia from his concurring opinion in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), as writing that procedural due process requires a judicial review of the sufficiency

and reasonableness of a civil jury's award of compensatory damages. DMS omitted the remainder of Justice Scalia's opinion. Immediately after Justice Scalia wrote that due process requires judicial review of a jury's damage award, he went on to write that "*. . . no one would claim (or at least no one has yet claimed) that a substantively correct determination of sufficiency of evidence and reasonableness of compensatory damages is a federal constitutional right.*" 509 U.S. at 471 (Scalia, J., concurring in the judgment, joined by Thomas, J.) (emphasis added).

In this case, judicial review of the jury's verdict occurred when the trial court heard and ruled on DMS' post-trial motions, and when the West Virginia Supreme Court of Appeals considered DMS' written petition for appeal and heard oral arguments in support of the petition. While Eagle does not concede that the decisions below were wrong, DMS does not have a federal constitutional right to have this Court determine whether the decisions below were correctly made. *Id.*

DMS argues that the decision below conflicts with the decisions of this Court. DMS relies primarily on *TXO* and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). However, DMS also cites *State Farm v. Campbell*, 538 U.S. 408 (2003) and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). In all of these cases, this Court looked at whether the state court's award of punitive damages against the defendant complied with the procedural requirements of the Federal Due Process Clause. In this case, the jury did not award

punitive damages. Thus, the decisions in *TXO, Oberg, Campbell,* and *Gore* do not apply, and should not be used in this case as a basis for reviewing the jury's award of compensatory damages only.

DMS also relies on *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). DMS cites this case for the general proposition that federal due process can extend to state action through the judicial branch of government. However, once again, *Brinkerhoff-Faris* is factually distinguishable from this breach of contract case.

In *Brinkerhoff-Faris,* the plaintiff sought an injunction against the county treasurer to prevent him from collecting taxes, which the plaintiff claimed to be excessive. At the time the plaintiff was assessed with the allegedly excessive tax, there was no administrative remedy in place which allowed the plaintiff to dispute the tax. The trial court denied the plaintiff relief without hearing the merits of the plaintiff's claim. Because there was no administrative remedy in place at the time the tax was assessed, the state court judgment denying the plaintiff relief violated its federal due process rights. *Brinkerhoff-Faris.*

In this case, unlike the plaintiff in *Brinkerhoff-Faris*, DMS cannot claim that it was not given an opportunity to be heard. DMS participated in a hotly contested trial which lasted almost three weeks. DMS submitted extensive post-trial motions, upon which the trial court also heard oral argument. After obtaining partial relief from the verdict on the purchase

contract, relief that far exceeded what DMS sought, DMS then filed its fifty-page petition for review with the West Virginia Supreme Court of Appeals. That court did not refuse DMS' petition until the court heard oral argument on the petition. Unlike the plaintiff in *Brinkerhoff-Faris*, who had no remedy at all, DMS has been provided ample opportunity to seek relief through the judicial process.

Brinkerhoff-Faris does not provide authority for this Court's review of the decisions below. In *Brinkerhoff-Faris*, this Court said that "... the mere fact that a state court has rendered an erroneous decision on a question of state law, ... does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." 281 U.S. at 680. While Eagle does not concede that the decisions below were wrong, assuming that a decision below was somehow incorrect, an incorrect decision in state court does not constitute a violation of federal due process. *Id. Brinkerhoff-Faris*, like the other punitive damages cases cited by DMS, does not provide a basis for DMS' petition for a writ of certiorari.

II. ASSUMING THAT DMS HAS A FEDERAL CONSTITUTIONAL RIGHT FOR THE PROCEDURAL REVIEW OF THE JUDGMENT RENDERED AGAINST IT, DMS RECEIVED THE PROCESS IT WAS DUE WHEN IT EXHAUSTED ITS POST-TRIAL REMEDIES IN THE TRIAL COURT, AND WHEN IT ARGUED ITS PETITION FOR APPEAL IN THE STATE APPELLATE COURT.

After the jury rendered its verdict against DMS, DMS filed a motion for judgment notwithstanding the verdict and alternatively, a motion for a new trial. DMS also filed a motion for a reduction of the jury's verdict in Eagle's related claim for breach of the purchase agreement against DMS. In regard to the motion to reduce Eagle's damages for breach of the purchase agreement, the trial court went far beyond the relief requested by DMS and reduced the verdict in Eagle's favor by two million dollars ($2,000,000.00.)

After the trial court entered its modified judgment against DMS, DMS filed its petition for appeal in the West Virginia Supreme Court of Appeals. DMS' brief in support of its petition was extensive. The brief met West Virginia's maximum length of fifty pages. Many of those pages contained lengthy footnotes. While there is no procedural requirement for oral argument in civil cases, the West Virginia

Supreme Court of Appeals ordered oral argument.[1] After considering the substantial written record, and the oral argument of counsel before the court, the West Virginia appellate court, by a vote of five to zero, granted Eagle's petition for reversal of the trial court's two million dollar ($2,000,000.00) reduction of Eagle's damages for breach of the purchase contract. Resp. App. 35a-36a. The West Virginia appellate court, by a vote of three to two, also rejected DMS' petition for appeal from the judgment against it for breach of the confidentiality agreement. Resp. App. 37a-38a.

DMS' petition for a Writ of Certiorari assumes that the West Virginia Supreme Court of Appeals gave little, if any, substantive consideration to its petition for appeal. There is nothing in the record to support this contention.

In this case, DMS received the same degree of due process, which every other defendant in West Virginia has the opportunity to receive: a trial on the merits, post-trial review of the jury's verdict by the trial court, and review of a petition for appeal by the West Virginia Supreme Court of Appeals. After DMS filed its petition for appeal, DMS also presented oral argument before the West Virginia appellate court. In this case, DMS has received the traditional due process to which Justice Scalia referred in *TXO*.

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[1] W. Va. R. App. P. 5(a) provides that "[t]he Court, at its discretion, may allow counsel for the petitioner . . . to make oral presentation . . . "

Thus, DMS does not have a federal constitutional right for a substantive review of the correctness of the state court's judgment.

III. THE TRIAL COURT'S REFUSAL TO GIVE PLAINTIFF'S INSTRUCTION 30-B IS NOT A PROPER BASIS FOR THIS COURT'S REVIEW OF THE JURY'S VERDICT.

As DMS correctly points out, Eagle offered an instruction that the jury could award damages for breach of the confidentiality agreement based on "Eagle's lost profits, or the Defendants' actual profits, whichever is greater." Resp. App. 28a-29a. DMS objected to this instruction, and the trial court sustained the objection. Resp. App. 30a-32a.

Later, Eagle once again requested that the trial court instruct the jury pursuant to Plaintiff's Instruction No. 30-B. Resp. App. 33a-34a. It is clear from the trial court's final charge to the jury that the court ultimately rejected this instruction. Resp. App. 10a-11a.

DMS states in its Petition before this Court that the record confirms that Eagle did not object to the trial court's final charge on the measure of damages. DMS Petition, page 4. This statement is misleading for several reasons. After Eagle offered Plaintiff's Instruction No. 30-B the first time, the trial court rejected the instruction by not including it in the court's initial draft of the charge to the jury. In regard to the trial court's initial draft of the charge, Eagle argued extensively for inclusion of Plaintiff's Instruction No. 30-B. Resp. App. 30a-34a.

Because Eagle offered the instruction concerning Eagle's lost profits or the Defendants' profits, it was not necessary to object to the court's refusal to include the language of Instruction 30-B in the charge. However, assuming that a subsequent objection was required, surely Eagle's arguments to the court in a second attempt to persuade the court to give the instruction constitutes an "objection" to the court's charge as given, even though the exact term "objection" was not included in Eagle's argument in favor of the instruction. To contend otherwise inexplicably exalts form over substance.

Additionally, Eagle preserved for a second time any error which the trial court made when it refused to give Plaintiff's Instruction 30-B. After the trial court's final discussion concerning the charge and the verdict, Eagle restated its arguments concerning the instructions which the trial court rejected. Resp. App. 34a. However, even though Plaintiff's Instruction 30-B was the better instruction under the law and the circumstances of this case, the instruction given by the trial court was a correct statement of the law, and was a sufficient basis for the jury's verdict.

IV. ANY ALLEGED ERROR ARISING FROM A JURY VERDICT BASED ON THE DEFENDANTS' PROFITS WAS WAIVED BY DMS AT TRIAL.

Ordinarily, a party may not claim evidentiary error on appeal where no objection is made at the trial level. *Wimer v. Hinkle*, 180 W. Va. 660, 379

S.E.2d 383 (1989). This Court will not consider an error, which is not properly preserved in the record. *State v. Browning*, 199 W. Va. 417, 485 S.E.2d 1 (1997); *Smith v. Holloway*, 169 W. Va. 722, 289 S.E.2d 230 (1982). In *Smith*, the plaintiff did not object to the trial court's exclusion of testimony. This Court held that the plaintiff waived his right to appeal the trial court's ruling when he failed to object at trial. When objections are not made in the trial court, and the matters concerned are not jurisdictional, such objections will not be considered on appeal. *Smith*.

Just as in *Smith*, in this case, DMS never objected to Eagle's testimony, or closing argument, about Eagle's damages from the breach of the confidentiality agreement. DMS' failure to object to Eagle's request for damages on this basis constitutes a waiver. DMS should not be allowed to raise its objection to evidence concerning Emerson's profits from DMS' breach of the confidentiality agreement on appeal. *Wimer*; *Smith*.

V. THIS COURT SHOULD NOT GRANT THE PETITION BASED ON THE FACT THAT APPELLATE REVIEW OF CIVIL CASES IN WEST VIRGINIA IS DISCRETIONARY.

DMS refers to the fact that there is no appeal as a matter of right in Virginia and New Hampshire. Yet, DMS fails to cite any cases from this Court, which holds that the lack of an appeal as a matter of right constitutes a violation of federal due process. DMS fails to cite a case in support of this argument

because there are no cases, which contain such a holding.

VI. THIS COURT SHOULD NOT GRANT THE PETITION BASED ON THE TRIAL COURT'S STATEMENTS CONCERNING SUMMARY JUDGMENT.

Summary judgment is a viable remedy in West Virginia when there are no genuine issues of fact, and the movant is entitled to judgment as a matter of law. W. Va. R. Civ. P. 56; *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994). The following cases show that West Virginia courts grant motions for summary judgment when it is appropriate to do so. *Strahin v. Sullivan,* 647 S.E.2d 765 (W. Va. 2007); *Dunbar Fraternal Order of Police, Lodge # 119 v. City of Dunbar,* 218 W. Va. 239, 624 S.E.2d 586 (2005); *Jackson v. State Farm Mut. Auto. Ins. Co.,* 215 W. Va. 634, 600 S.E.2d 346 (2004); *West Virginia Fire & Cas. Co. v. Stanley,* 216 W. Va. 40, 602 S.E.2d 483 (2004); *Chafin v. Gibson,* 213 W. Va. 167, 578 S.E.2d 361 (2003).

In this case, the trial court's refusal to grant judgment as a matter of law in favor of DMS does not support granting DMS' petition for a writ of certiorari. Eagle's evidence created genuine issues of material fact, which only a jury could decide. The trial court's alleged misconception concerning the West Virginia's Supreme Court's proclivity to reverse summary judgments is not relevant if the evidence

in this case created genuine issues of material fact. The evidence discussed below shows that there were genuine issues of fact in support of Eagle's claims. The evidence discussed below also supports the jury's verdict in Eagle's favor.

VII. ASSUMING THAT DMS HAS A FEDERAL CONSTITUTIONAL RIGHT FOR SUBSTANTIVE REVIEW OF THE JUDGMENT RENDERED AGAINST IT, THE EVIDENCE ADMITTED AT TRIAL WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT.

The confidentiality agreement between Eagle and DMS protected information pertaining to Eagle's "system architecture" and "know-how." Resp. App. 3a. Paragraph A 2 of the agreement further restricted the parties from divulging information not consistent with the "project." *Id.* Daniel Industries and Emerson, two other defendants at trial, were not involved in this "project." DMS does not contend that the evidence was insufficient at trial to support the jury's verdict that DMS breached the confidentiality agreement. The basis of DMS' lack of evidence claim is the fact that the jury awarded Eagle damages based on the profits which arose from DMS' breach of the confidentiality agreement. As a matter of fact and as a matter of law, the evidence admitted at trial was sufficient to support the jury's verdict.

In the discovery phase of this litigation, the defendants produced a chart pertaining to Emerson's

profits from the sale of the FB103 and FB104. See Pet. App. J. At trial, when this chart was shown to Randy Page during his cross-examination, he testified that the numbers shown in the chart were too low. Resp. App. 39a-45a. Based on Randy Page's admission, Eagle then created a demonstrative exhibit, which was consistent with Mr. Page's testimony at trial. Resp. App. 25a. In this exhibit, Eagle demonstrated that Emerson's profit for sale of the FB103 totaled thirteen million, nine hundred, ninety-two thousand, three hundred dollars, ($13,992,300.00.) The profit for Emerson's FB104 was three hundred, twenty-four thousand, nine hundred forty-five dollars ($324,945.00.) Emerson's profit from sales of both the FB103 and FB104 totaled fourteen million, three hundred seventeen thousand dollars, ($14,317,000.00.) Resp. App. 25a. This evidence clearly provides an adequate basis for the jury's award of damages in Eagle's favor.

Alternatively, even if this evidence of the profits arising from DMS' breach is somehow inadequate, DMS never objected to Randy Page's testimony. Resp. App. 39a-45a. Nor did DMS object to Eagle's use of the demonstrative chart, which showed Emerson's profits from the sale of the FB103 and the FB104. Resp. App. 25a. DMS also failed to object to the closing argument of Eagle's counsel when he argued that the jury should award this amount to Eagle for the defendants' breach of the confidentiality agreement. Resp. App. 26a-27a.

The jury's award of damages based on the profits of Defendant Emerson is also proper as a matter of law. The purpose of damages for breach of a contract is to compensate the injured party for the loss caused by the breach. 5 Corbin On Contracts § 1002, at 31 (1964). Generally, those damages are measured by the plaintiff's actual loss. Restatement (Second) of Contracts § 347 (1981).

There are cases, however, where it is appropriate to use the defendant's profits as the measure of the plaintiff's damages. *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U.S. 200, 204-07, 14 S.Ct. 523, 525-26, 38 L.Ed. 411 (1894); *Murphy v. Lifschitz*, 183 Misc. 575, 577, 49 N.Y.S.2d 439, 441 (Sup. Ct. N.Y. County 1944) *aff'd mem.* 268 A.D. 1027, 52 N.Y.S.2d 943 (1st Dep't) *aff'd mem.* 294 N.Y. 892, 63 N.E.2d 26 (1945). A defendant's profits may be recoverable in a breach of contract action "when those profits tend to define the plaintiff's loss." *U.S. Naval Institute v. Charter Communications, Inc.*, 936 F.2d 692 (2nd Cir. 1991).

In *Naval*, the U.S. Naval Institute owned the rights to distribute the hardbound version of the novel, *The Hunt for Red October*, by Tom Clancy. The Institute entered into a licensing agreement with Berkeley, which gave Berkeley the right to distribute the paperback version of the book. The contract prohibited Berkeley from distributing the paperback before October 1986. In the early part of September 1985, Berkeley shipped one million, four hundred

thousand copies of the paperback to various sellers. In violation of the licensing agreement between Institute and Berkeley, sales of the paperback began two weeks early, on September 15, 1985. So many paperbacks were sold in the latter part of September, 1985, that the book rose to the top of the bestseller list for paperbacks by the end of the month. The Institute sued Berkeley for breach of the licensing agreement. *Naval.*

After a judge-alone trial, the court awarded the Institute damages for Berkeley's breach of the licensing agreement. The court based part of Institute's damages on Berkeley's profits from the sale of the book in the last two weeks of September. On appeal, Berkeley contended that damages based on the defendant's profits were improper because such damages were not part of the plaintiff's actual loss. The appellate court disagreed. *Naval.*

The appellate court first noted that there was no proof as to precisely what the unimpeded volume of hardcover sales would have been for the entire month of September. Any such evidence would necessarily have been hypothetical. However, it was not error to lay the normal uncertainty in such hypotheses at the door of the wrongdoer who altered the proper course of events, instead of laying the uncertainty at the door of the injured party. *Naval.* Doubts are generally resolved against the party in breach. Restatement (Second) of Contracts § 352 (1981) comment a. Consequently, it was not improper, given the inherent uncertainty of the circumstances created by the

breaching party, to exercise generosity in favor of the injured party. *Naval.*

In *Murphy*, the defendant entered into a contract to sell liquor to the plaintiff. The defendant breached the contract by selling her liquor to third parties. In a judge-alone trial, the trial court found that the plaintiff's measure of damages was the profit realized by the seller's breach. When ruling in favor of the plaintiff, the court also held that the plaintiff was not required to prove her damages with mathematical exactness or precision. The Court said that "[o]ne who has wrongfully breached a contract cannot insist on proof which is unobtainable by reason of his breach." In further support of the court's award of damages based on the breaching party's profits, the court held that the trier of fact may act upon probable and inferential, as well as direct and positive, proof. *Murphy.*

Just as in *Naval* and *Murphy*, the jury in this case was correct when it awarded Eagle damages for DMS' breach of the confidentiality agreement based on Emerson's profits from the theft of Eagle's technology. At the time of the breach, Eagle was selling flow computers to DMS. At the time of the breach, Eagle was DMS' "main vendor" for computers, which were to be used in the defendants' e-flow project. Resp. App. 46a-51a. DMS breached the mutual confidentiality agreement by supplying Emerson with Eagle's technology and know-how. Based on this stolen confidential information, Emerson sold computers,

which Eagle would have sold had the breach of the confidentiality agreement not occurred.

Because of the wrongful conduct of DMS, it should not be allowed to question how the jury arrived at ten million, five hundred thousand dollars, ($10,500,000.00) for breach of the confidentiality agreement. Because DMS allowed Emerson to steal Eagle's protected information, Emerson sold flow computers, which Eagle would have sold. DMS does not contest the fact that Eagle was DMS' "main vendor." Resp. App. 49a. Any uncertainty concerning the amount of Eagle's damages, which Eagle does not concede, should not inure to the benefit of DMS. It is not error to lay the normal uncertainty caused by the breach at the door of the wrongdoer who altered the proper course of events, instead of laying the uncertainty at the door of the injured party. *Naval*. "One who has wrongfully breached a contract cannot insist on proof which is unobtainable by reason of his breach." *Murphy*.

In this case, as did the trier of fact in *Naval* and *Murphy*, acted on probable and inferential, as well as direct and positive proof, and that reliance is proper. *Murphy*. Because Emerson's profits from the sale of flow computers tends to define Eagle's loss, and because any doubt concerning the amount of damages should be resolved against the party in breach, the jury's award of damages based on Emerson's profits should not be reversed. *Naval*; *Murphy*; Restatement (Second) of Contracts § 352 (1981).

The profits which Emerson made as a result of DMS' breach of the confidentiality agreement is also a proper measure of Eagle's loss because DMS' and Emerson's theft of Eagle's technology is the functional equivalent of misappropriating trade secrets. DMS conceded in its petition filed with the West Virginia Supreme Court that this is true. Resp. App. 52a-54a. In trade secret cases, the plaintiff's damages are based on the amount of the plaintiff's loss, or the amount of the defendant's gain. *Carbo Ceramics, Inc., v. Keefe*, 166 Fed. Apex. 714, WL 197340 (5th Cir. 2006); *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974).

In *University Computing*, a computer company brought an action for breach of a joint venture agreement, misappropriation of plaintiff's computer system, and violation of a non-competition agreement. The Fifth Circuit Court of Appeals relied on analogous cases to determine a proper remedy, stating that the proper measure of damages for misappropriation of a trade secret is determined by reference to analogous cases involving patent infringement, just as patent infringement cases are used by analogy to determine damages for copyright infringement. *Id.* Because the defendant earned profits from its wrongful misappropriation of the plaintiff's trade secrets, in violation of the parties' non-disclosure agreement, the defendant's actual profits was the proper measure of the plaintiff's damages. *University Computing.*

In this case, as DMS has admitted, DMS' theft of Eagle's technology in violation of the confidentiality agreement is the "functional equivalent" of misappropriating a trade secret. Resp. App. 54a. When determining the proper measure of damages in cases such as this one, it is proper to rely on analogous cases. *University Computing*. Just as it is proper to apply the remedies available for a patent violation in a trade secret case, it is also proper to apply the remedies available for stealing a trade secret to a breach of a confidentiality agreement, particularly when the breach of the confidentiality agreement is the functional equivalent of misappropriating a trade secret. Whether Eagles' claim is labeled a claim for "misappropriating a trade secret," or "breaching a confidentiality agreement," the injury resulting from the theft of Eagle's technology is the same. Because damages based on the defendant's profits is a clearly-authorized remedy in analogous cases of trade secret misappropriation, the jury's award in this case based on Emerson's profits should not be reversed. *University Computing; Ajaxo v. E*Trade Group, Inc.* 135 Cal. App.4th 21, 37 Cal. Rptr.3d 221 (2006).

In *Ajaxo*, the plaintiffs claimed misappropriation of trade secrets and breach of a confidentiality agreement concerning wireless stock trading technology against E*Trade Group, Inc. In Ajaxo's complaint, it sought damages for its lost profits. At trial, Ajaxo changed its theory of recovery to unjust enrichment,

even though Ajaxo did not include a claim of unjust enrichment in its pleadings. After a trial, the jury awarded Ajaxo damages based on the defendants' profits, and the defendants appealed. *Ajaxo*.

The appellate court held that there was substantial evidence supporting the jury's award of damages to Ajaxo for E*Trade's breach of the parties' mutual non-disclosure agreement. The court noted that the evidence of damages for misappropriation of Ajaxo's technology was the same as the evidence of damages for contractual breach. Because E*Trade earned profits from its breach of the non-disclosure agreement, the court said that Ajaxo must be "compensated" for E*Trade's breach. The jury was correct when it awarded Ajaxo damages based on evidence of E*Trade's profits. *Ajaxo*. In this case, the jury's award of damages based on evidence of Emerson's profits arising from the breach of the confidentiality agreement was not erroneous.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THE SUTTER LAW FIRM, PLLC
JOHN E. SUTTER
Counsel of Record
ROBERT H. MILLER, II
ROGER A. DECANIO
1598 Kanawha Blvd., East
Charleston, WV 25311
304/ 343-1514
304/ 343-1519 facsimile

Attorneys for Respondent, Eagle Research Corporation

October 22, 2007

APPENDIX A

PLAINTIFF'S EXHIBIT 45

4036 Teays Valley Rd., Scott Depot, WV 26560-0668

Eagle Research Corporation

Fax

To: Mike Johnson **From:** Dave Kimberling

Fax: 713.827.3382 **Pages:** 4 including cover

Phone: 713.827.5182 **Date:** 06/30/99

Re: Mutual Confidentiality Agreement

CC:

☐ **Urgent** ☐ **For Review** ☐ **Please Comment**
☐ **Please Reply** ☐ **Please Recycle**

Mike –

MCA follows, only change was to the signature line, Jim signed instead of John. Other than that, looks OK to us. Let us know if you need anything else. Are we getting close?

Regards,

/s/ Dave

[LOGO]
EAGLE RESEARCH CORPORATION
Automation Solutions
4036 Teays Valley Road,
Scott Depot, West Virginia 25560
Phone 304-757-6565 FAX 304-757-3332

Michael B. Johnson, Vice-President
Daniel Measurement Services
1133 Bunker Hill Road
Houston, TX 77055

June 30, 1999

Re: Mutual Confidentiality Agreement

Dear Mike:

Attached are two signed originals of the above referenced document. Please execute both and return one to us for our files. We look forward to future discussions and bringing our project to closure with you. As I have indicated, I fully believe that what we are beginning here will be a long standing and mutually beneficial business relationship between two quality organizations.

I look forward to hearing from you and Lee next week.

Sincerely,

David W. Kimberling

MUTUAL CONFIDENTIALITY AGREEMENT

This Agreement is entered into as of this 30th day of June 1999, by and between Daniel Measurement Services, Inc., a Delaware corporation with a place of business at 1133 Bunker Hill, Houston, Texas 77055 ("DMS"), and Eagle Research Corporation, a West Virginia corporation, with a place of business at 4036 Teays Valley Road, Scott Depot, WV 25560 ("Eagle").

DMS and Eagle may provide to each other certain confidential, proprietary and/or trade secret information and material, including protocol structures, pricing and supported core system technologies, relating to the XA Family RTU Products and Subsequent Peripherals (the "Project"). Such information, including financial information, projections, marketing plans, customer lists, marketing and product strategies, product plans, drawings, prototypes, concepts, software, system architecture, know-how, and other trade secrets is deemed by the parties to be confidential (collectively. the "Information").

A. It is understood that unauthorized disclosure or use, whether intentional or unintentional, of any of the Information may be detrimental to the disclosing party. Accordingly, both parties agree:

1. To maintain in confidence the existence of this Agreement and the fact that discussions pertaining to the Project have occurred or are occurring between DMS and Eagle.

2. Not to use any of the Information received from the other party for any purpose other than in connection with the Project.

3. To maintain all of the Information in confidence and not to disclose any portion of the Information to any person or entity other than each party's representatives (which term shall include such party's directors, officers, employees, agents and advisors) who have a need to know the Information in order for such party to perform its obligations under the Project.

4. To cause each of the party's representatives who has access to the Information to comply with the terms and provisions of this Agreement in the same manner as each party is bound hereby, with each party remaining responsible for the actions and disclosures of such representatives.

5. When the Project is completed or when negotiations in connection therewith are terminated, or upon the disclosing party's request, promptly to return to the disclosing party or destroy all documents or other tangible materials containing and/or embodying any of the Information (including, without limitation, all copies, reproductions, summaries and notes of the contents thereof), regardless of the person causing the same to be in such form, and the president or a vice president of the receiving party will certify to the disclosing party that the provisions of this paragraph have been complied with.

6. In making the Information available to the other party, no party shall have any obligation to the other, and hereby disclaims any warranty, as

to the accuracy, completeness or usefulness of the Information or that the use of such Information does not infringe privately owned rights of third parties.

7. All Information provided the parties shall, to the fullest extent possible, be marked with a prominent stamp or legend to reflect its proprietary or confidential nature. The disclosing party shall make every effort to reduce verbal Information to writing. In the event Information is disclosed verbally and not reduced to writing, the disclosing party shall advise the receiving party or its representative that the information is confidential.

B. The obligations pursuant to this Agreement shall not apply to:

1. Information that, at the time of disclosure, is, or, after disclosure, becomes generally known or available to the public other than as a consequence of the receiving party's breach of this Agreement;

2. Information that was known or otherwise available to the receiving party prior to the disclosure by the disclosing party;

3. Information disclosed by a third party to the receiving party after the disclosure by the disclosing party if such third party's disclosure neither violates any obligation of the third party to the disclosing party nor is a consequence of the receiving party's breach of this Agreement;

4. Information that is independently developed by the receiving party without reference to the Information; or

5. Information that the disclosing party authorizes, in writing, for release.

C. In the event that the receiving party or its representative receives a request to disclose all or any part of the Information under any (i) terms of a valid and effective subpoena or order issued by a court of competent jurisdiction or (ii) order by a governmental body, or is obligated to disclose any Information under any statute or regulation applicable to the receiving party, the receiving party agrees to:

1. Immediately notify the disclosing party of the existence, terms and circumstances surrounding such a request, so that it may seek an appropriate protective order and/or waive the receiving party's compliance with the provisions of this Agreement; and

2. If disclosure of such Information is required in the opinion of the receiving party's counsel, cooperate to the extent possible with the disclosing party in obtaining reliable assurances that confidential treatment will be accorded to the disclosed Information.

D. The parties hereto acknowledge that the Information is the property of the disclosing party and the disclosure of the Information to the receiving party does not convey any right, title or license in the Information to the receiving party. The receiving party shall not appropriate the Information to its own

use or to the use of any third party and shall only use the Information for the exclusive benefit of the disclosing party except to the extent authorized in writing by the disclosing party.

E. Each party understands and agrees that the other party might be irreparably harmed by a breach of this Agreement by the receiving party and that the damage to the disclosing party would be difficult if not impossible to assess in pecuniary terms. Accordingly, in addition to any other remedies that the disclosing party may have, the disclosing party shall be entitled to equitable relief, including preliminary and permanent injunctive relief, in the event of a breach or threatened breach of this Agreement by the receiving party.

F. It is further understood and agreed that no failure or delay by the disclosing party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

G. The provisions of this Agreement shall survive the termination of the Project for a period of five (5) years.

H. This Agreement shall be governed by and construed in accordance with the substantive laws of the State of West Virginia. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under

applicable law, but if any provision hereof shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement. All obligations of the receiving party and rights of the disclosing party expressed herein shall be in addition to, and act in limitation of, those provided by applicable law. This agreement contains the entire agreement between the DMS and Eagle pertaining to the Project, and supersedes any previous oral or written agreements, commitments or understandings. This Agreement may be modified or waived only by a separate writing by Eagle and DMS expressly so modifying or waiving such. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one instrument. References to DMS and Eagle shall be deemed to include each of their affiliates, if any.

I. Nothing contained herein obligates DMS or Eagle to enter into an agreement with the other in connection with the Project or to otherwise prohibit or restrict it from pursuing the Project on its own or with another party, as long as it does not use any Information of the other party in connection therewith. Nothing herein shall require either party to disclose information, confidential or otherwise, to the other party.

IN WITNESS WHEREOF, the parties acknowledge their agreement to the foregoing by due execution of

this Agreement by their respective authorized representatives.

DANIEL MEASUREMENT SERVICES, INC.	EAGLE RESEARCH CORPORATION
By: Michael B. Johnson	By: James N. Butch
Name: Michael B. Johnson	Name: James N. Butch
Title: Vice President	Title: President
Date 6/30/99	Date 6/30/99

APPENDIX B

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants.

CIVIL ACTION NO.
03-C-119

V.

JIM BUTCH,

Third-Party Defendant.

CIVIL CHARGE

(Filed April 13, 2006)

If you find by a preponderance of the evidence that Eagle Research breached the confidentiality agreement entered into by Eagle Research and DMS, then you may award damages in the amount of money which fairly compensates DMS, to the extent possible, for reasonably ascertainable losses proximately caused by the breach.

* * *

APPENDIX C

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants.

CIVIL ACTION NO.
03-C-119

V.

JIM BUTCH,

Third-Party Defendant.

CIVIL CHARGE

* * *

If you find by a preponderance of the evidence that the defendant DMS breached the confidentiality agreement entered into by Eagle Research and DMS, then you may award damages in an amount of money which fairly compensates Eagle Research, to the extent possible, for reasonably ascertainable losses proximately caused by the breach.

* * *

APPENDIX D

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants

CIVIL ACTION
NO. 03-C-119

V.

JIM BUTCH,

Third-Party Defendant.

DIRECT EXAMINATION OF JAMES BUTCH

(Filed March 28, 2006)

* * *

[231] of our competing division." I said, "Well, we're not interested in participating in some kind of fishing expedition either. You know, if we put a lot of time into this bid, you've got to give us some assurances that we're not wasting our time if we're selected as the winner." And I said, "How many are you talking about here? Are we talking about a lot of units or a few units?" Because if he'd said a few units, I'd said

"forget it." He said, "We're looking at 3,000 units a year." I said, "Will the first year's quantity be a firm commitment?" And he said, "We can make the first year's quantity a firm commitment." And I said, "Now, you're going to give us absolute assurances that if we bid on this no information that we supply you whatsoever or arguments will fall into the hands of your competing divisions," and they gave me absolute assurance of that. And I said, "Are you willing to reduce this to writing?" He said "it will be part of the bid process that we send out that we will give absolute assurances. And there will be a written confidentiality agreement forthcoming to the winner after that." But the bid process would include a confidentiality agreement as well, and this was previous passed by – I got a phone call from Mike Johnson explaining the confidential commitment.

Q Mike Johnson was?

A Okay, I'm sorry. Mike Johnson was their

* * *

APPENDIX E

PLAINTIFF'S EXHIBIT 6

John Booth

From: Dave Kimberling [davek@eagleresearchcorp.com]
Sent: Thursday, August 26, 1999 4:31 PM
To: Mike B. Johnson; Lee Burkett
Subject: jimb@eagleresearchcorp.com; John Booth Steam Info

Lee-

In response to your request regarding Steam Calculation, we are planning to program the equations for Superheated Steam as defined in the ASME Steam Tables – Sixth Edition. We have no current plans to program the equations for Saturated which then leads us into steam Quality and Inherently measurement accuracy issues. We will use an orifice mass flow equation for the computation of mass volumes through the meter. There will also be a set of installation criteria developed for the RTU that assures liquid filled lead lines to protect the transducers in the RTU from harmful temperatures.

On the pricing front, let me clarify the current structure as we understand it:

$1492.65 – Current RTU configured the same as the first 10 that you have currently on order that includes all of the I/O capabilities as defined In the /1 Product brochure. This would also be our proposed

price for units during the first year that required I/O functionality.

$1350.00 – Based on your current commitment for 3000 units during the next 12 months that will be the current RTU with all of the unnecessary parts removed from the board relative to I/O and other unused functions which will essentially get you to the "Chart Replacement" mode level for the first year.

$1150.00 – A new board layout developed for you that will be a true "Chart Replacement" with no I/O capability and no expansion path as we currently envision it. This layout will be further discussed with you as we move forward.

Hope this clarifies the water some. If we are not all on the same page, then lets discuss, but at this point it is where we think we are with you. You can by the way mix and match any of the above throughout the year, it is the 3000 unit quantity that gets us the necessary component discounts.

As we have indicated, in order to meet even these price points require us to commit to ordering large volumes of components in order to get the necessary savings to pass along to you, so the sooner we can "concretely" commit to our suppliers the better.

On another note, we would be interested in discussing with you becoming the installation arm for this equipment. This venue may decrease everyone's headaches especially initially going into all of this. We would certainly give you some "most favored

nation" labor rates if you are interested. Maybe this way, you could relax some and we will absorb some of the initial stresses of startup. Just a thought.

Depending on when you get this, if you have any questions, either email me and I will check it late this evening, or I will be at home after 8:30 p.m. your time this evening 304-757-9636. If you have questions we need to discuss, please do not hesitate to call me at home.

I am attaching the files you requested. The base /1 file is in Word. I am attaching two additional files in PDF (Adobe http:\\www.adobe.com) format. Also all of this information is available on our website at http:\\www.eagleresearchcorp.com.

Let me know if you need anything else.

Regards,

Dave

APPENDIX F

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

EMERSON ELECTRIC CO.,
DANIELS INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants.

CIVIL ACTION
NO. 03-C-119

V.

JIM BUTCH,

Third-Party Defendant.

CROSS-EXAMINATION OF JAMES BUTCH

(Filed March 28, 2006)

[461] Q Can you answer my question?

A No. I think we could have had a blanket purchase order number by then for sure, yes.

Q Maybe you didn't hear my question.

A It goes back and forth.

Q Let me repeat my question. Eagle did not receive an order for 3000 units because DMS did not have anybody to sell 3000 units to?

A I don't know if that's correct, John. I don't know. They had – I know that they had numerous quotes out there, and one alone was for 3000 units. One customer alone. Then they had 320 other quotes that Lee was working on, and for all I know the number could have been 10,000.

Q Mr. Butch, if DMS had had an order for 3,000 units from one, ten or a hundred customers, don't you think you at Eagle Research would have been the first to know?

A I would have been one of the first to know if they had the order in hand. But for all I know, it was imminent, though.

Q And you know that there was not a customer at DMS who ordered a hundred units, much less 3000 units?

A No, that's not correct. The Texaco order for that steam measurement was for 200 units alone, and we put it in and right after we put it in it was taken out by who?

[462] Q Show us the evidence that you sold 200 flow computers to Texaco?

A Didn't we invoice the pressure transducers to them? The evidence is on the record. We invoiced the pressure transducers.

Q Didn't you tell the members of the jury in response to Mr. Sutter's questions yesterday that you thought that the total number of units that you sold to DMS during this project was 47?

A That's right, because somebody stopped it right after we bought the parts for it, somebody stopped it. But DMS paid for the pressure transducers because they couldn't follow through on it because it was yanked out and a Fisher one put in.

Q We're going to get to putting Fisher in in a moment. But you did not sell 47 – I mean 100 or 200 flow computers to anybody?

A Lee was working on an order –

Q Did you?

A – for 200 and we ordered the pressure transducers for them. It got that far. Do you want them? I'll go bring them to you. They're sitting in a closet at our place because we can't use them because they're arranged just for steam and we haven't done any steam projects.

* * *

APPENDIX G

PLAINTIFF'S EXHIBIT 748

Eagle Business Record LOSS [by J .B.]
3/27/06

Contract Number of Units:		3000
Number Sold:		46
Number Remaining:		2954
Profit Margin:		50%
Quoted Base Price of Flow Computer:		$1350.00
	x	.50
Margin Each:		$675.00
Remaining units:	x	2954
First Year Loss on Flow Computers:		$1,993,950.00
Comm. Options:		$1284.97
	x	.50
		$642.49
	x	2954
First Year Loss on Comm. Options:		$1,897,915.46
		1,993,950
		1,897,915
Total First Year Loss:		$3,891,865.

APPENDIX H

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants.

CIVIL ACTION NO.
03-C-119

V.

JIM BUTCH,

Third-Party Defendant.

DIRECT EXAMINATION OF JAMES BUTCH

(Filed March 28, 2006)

* * *

[321] Q Right. Now, in August and September of 2000, did you have outstanding invoices that were unpaid by DMS?

A Yes.

Q And did you, did there come a time when you inquired about payment of those invoices?

A Yes.

Q Now, in August of 2000, did you ever call anyone from DMS and not get a return phone call?

A After Mike Johnson left – That was the case right along, until I got, one day I got a phone call from Jon Milliken, but it seemed like there was a dark period for sure.

* * *

APPENDIX I

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants.

CIVIL ACTION NO.
03-C-119

V.

JIM BUTCH,

Third-Party Defendant.

DIRECT EXAMINATION – DR. ROY NUTTER

(Filed April 2, 2006)

* * *

[686] Q Well, Dr. Nutter, now that we've completed your table, if you could in one or two or three sentences for the jury, could you sum up and explain your opinion? Is that even possible?

[687] A It's always possible. Let me come out where you can see this whole table. When looking at this table, what I would conclude from this is that the 503 and 553, being pre-Eagle, don't seem to have the

same kind of design. The post-Eagle, the 103/104 seem to have and do have the same techniques, the same design that the Eagle has. Now, not exactly. Though you can't say, or I don't think one can say, that this is an exact copy, but I think that what happened here is probably that the design architecture that was used in the Eagle was used to do the design architecture of the 103/104. They're just – All these pieces sort of lead to that conclusion, and do lead to that conclusion for me.

Q And again that's to a reasonable degree of engineering certainty?

A Yeah. There's no way, I don't see, of being just absolutely one hundred percent certain that that occurred. And I don't feel that I was sitting with the engineers when they were doing the designs, I wasn't looking over their shoulder to see if they were actually copying the stuff. It's not one to one in that this wire goes exactly the same place as that wire, but the techniques are there. And you could see them – not see them before and then you can see them after. And that's where I think the reasonable engineering thought says, yeah, this looks like the design was copied and the [688] design of the architecture. Not in the process, where's the wire go, but in the design of the architecture.

MR. DECANIO: Your Honor, I have no further questions.

* * *

APPENDIX J

FLOWBOSS 103 AND 104 PROFITS

FB 103

YEAR	PRICE	MARGIN	UNITS SOLD	PROFIT
2002	$3500	x .45	456	$718,200
2003	$3500	x .45	1985	$3,126,375
2004	$3500	x .45	2889	$4,550,175
2005	$3500	x .45	3554	$5,597,550
			TOTAL	$13,992,300

FB 104

YEAR	PRICE	MARGIN	UNITS SOLD	PROFIT
2002	$2900	x .45	0	0
2003	$2900	x .45	90	$117,450
2004	$2900	x .45	44	$57,420
2005	$2900	x .45	115	$150,075
			TOTAL	$324,945

GRAND TOTAL PROFITS: $14,317,245

FB 103 Price quoted as $3500

FB 104 Price quoted as $2800-$3000

APPENDIX K

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

CIVIL ACTION NO.
03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants.

v.

JIM BUTCH,

Third-Party Defendant.

PLAINTIFF'S CLOSING ARGUMENT

* * *

[1682] Their pre-tax profits. That was pre-tax. After taxes it was $1,422,000,000. When they stole the technology, when they stole the machine, they devastated the corporate competitive situation of Eagle Research.

And I believe the evidence is overwhelming that they took the contract, they breached it. You know, Milliken and Page testified they didn't know or care there was a contract when they shut this place down.

They were going to get rid of their competitor. It's kind of interesting, because if you don't know and don't ask and don't care, how can you be surprised? Isn't it odd, you know, if you just get away from the whole whine thing for a second, there wasn't one witness that they produced that said there wasn't one. Jim Butch and all the documents, if you analyze the law and follow the Court's instructions, said there were $4,000,000. If you take the profits from these people for taking this man's technology and putting it in a different box and making a profit on it, $14,317,000. That's an $18,000,000 box.

I honestly never thought I'd stand up in front of a jury and say you ought to give Eagle Research Company $18,000,000, but I'm doing it today. I'm used to being in Magistrate Court and Circuit Court and handle criminal cases. But it's the only way to right a wrong. It's the only way to remedy this is to at least give him his contract back, to give [1683] him the profits that they got from taking his machine.

* * *

APPENDIX L

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

5. [sic]

EMERSON ELECTRIC CO., *et al.*,

Defendants.

Civil Action No. 03-C-119
Judge O. C. Spaulding

DAMAGES FOR BREACH OF CONFIDENTIALITY AGREEMENT

Plaintiff's Instruction No. 30-B

Eagle Research Corporation claims that the defendants are liable for the breach of Eagle's confidentiality agreement with Daniel Measurement Services. If you find, by a preponderance of the evidence that the defendants, or any of one of them, breached Eagle's confidentiality agreement, then you must find in favor of Eagle Research Corporation, and award damages in an amount which is supported by the evidence.

In this case, the measure of plaintiff's damages can be based on the value of what has been lost by the plaintiff, or the value of what has been gained by the defendants, or any one of them. In other words, for breach of Eagle Research Corporation's confidentiality agreement, you may award damages based on:

1. Eagle's lost profits; or the
2. Defendants' actual profits,

whichever amount is greater.

Authority:

Carbo Ceramics., Inc., v. Keefe, 2006 WL 197340 (5th Cir. (Tex.)); *Saforo & Associates, Inc., v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999); *University Computing Co. v. Lykes-Younsgtown Corp.*, 504 F.2d 518 (5th Cir. 1974): *Elcor Chem. Corp. v. Agri-Sul, Inc.*, 494 S.W.2d 204 (Tex. App.-Dallas 1973, *writ red'd n.r e.*); *Schreyer v. Casco Products Corp.*, 190 F.2d 921, *cert.*

APPENDIX M

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

CIVIL ACTION NO.
03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants.

v.

JIM BUTCH,

Third-Party Defendant.

HEARING ON THE INSTRUCTIONS

(Filed April 6, 2006)

* * *

[1586] were clear enough under the rules for notice pleading. It's always better to be more precise.

THE COURT: Okay. Next issue.

MR. MILLER: Your Honor, on Paragraph 7 – I'm sorry, Page 7, in regard to when a cause of action accrues, we have certainly the appropriate language concerning when the plaintiff should become aware

using reasonable diligence, but I believe it's a two pronged test for the discovery rule. One is knowing or should have known when the plaintiff has been injured; and the second element is knowing or should have known the identity of the wrongdoer. I think we need an additional sentence that includes that second element as to the identity of the wrongdoer.

Okay. Now, turn to Page 8, last full paragraph. While we don't have any problems with the Court's fair, adequate compensation for such loss of damage, we believe that it's also appropriate to go into a little bit more detail in regard to the damages which the plaintiff is claiming. And we would like the Court to also include in its charge our instruction concerning lost profits of the plaintiff arising from the breach of the purchase agreement for the 3000 flow computers and also the recovery of the defendant's profits for the breach of the confidentiality agreement. Those would be previously proffered Instructions 30-A and 30-B, which again [1587] because we've given you so much paper, I can provide you with my two somewhat messy copies if you'd like, Your Honor.

THE COURT: It would be a help.

MR. MILLER: 30-A pertains to lost profits for breach of the contract for sale of the 3000 flow computers. 30-B is for the breach of the confidentiality agreement. One issue too –

MR. TATE: For the record, Your Honor, we object to those.

THE COURT: I'm going to come back.

MR. TATE: It's simple just to say we don't think that's appropriate. That's all I need to say at this point.

MR. MILLER: Your Honor, we have the requirement too in a contract case – I never really understood this rule, but it's by statute – in order for there even to be the possibility to obtain prejudgment interest in a contract case, the jury has to be instructed as to the possibility of that element.

THE COURT: We can't in a contract case, we can't – the Court can't add it?

MR. MILLER: No, sir, not according to my reading of the Thompson v. Stuckey case. And so therefore we believe it is incumbent on us to ask the Court to provide an instruction in regard to prejudgment interest in a contract case. If we

* * *

APPENDIX N

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

CIVIL ACTION NO.
03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants.

v.

JIM BUTCH,

Third-Party Defendant.

HEARING ON THE INSTRUCTIONS

(Filed April 11, 2006)

* * *

[1613] confidentiality agreement before there can be tortious interference.

And in that Verdict Form 12 and also Verdict Form 15 again, there's reference to relationships as opposed to contracts. We believe that is improper. I may have for clarity purposes, Your Honor, going back to my objection on the Court's Instruction with respect to confirmatory memoranda, if there is a confirmatory

memorandum as the plaintiff argues, that only removes the statute of fraud defense. The plaintiff still has the burden of proof of all contract terms, all material terms, as instructed and we believe that instruction should be –

THE COURT: Mr. Sutter, do you wish to defend those areas the defendant feels are deficient?

MR. SUTTER: Your Honor, for the record we would incorporate by reference all of the previous arguments we've made on the record over several days to save a whole lot of time. We would incorporate those by reference and Mr. Miller may have a couple statements for the record.

MR. MILLER: Your Honor, just for purposes of making sure the record is clear, we would like to reiterate our objection in regard to the verdict form concerning Mr. Lee Burkett. We believe, with all respect, that the Court has improperly made a finding as to him breaching his fiduciary

* * *

APPENDIX O

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2007, the following order was made and entered:

Eagle Research Corporation, Plaintiff Below, Appellant

vs.) No. 33442

Emerson Electric Co., Daniel Industries, Inc., and Daniel Measurement Services, Inc., Defendants and Third Party Plaintiffs Below, Appellees

vs.

Jim Butch, Third Party Defendant Below, Appellee

On a former day, to-wit, February 6, 2007, came the petitioner, Eagle Research Corporation, by John E. Sutter, Roger H. Miller, II and Roger A. Decanio, The Sutter Law Firm; and William C. Forbes, Forbes Law Office, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Putnam County, rendered on the 18th day of August, 2006, with the record accompanying the petition. Thereafter, on the 7th day of March, 2007, came the respondents, Emerson Electric Co., et al., by Ancil G. Ramey and Hanna B. Curry, Steptoe & Johnson, PLLC; John L. Tate and Jennifer L. Kovalcik. Sites & Harbison, PLLC; Robert J. McAughan, Jr., Locke Liddell & Sapp, LLP; and

W. Michael Moore and Rita M. Biser, Moore & Biser, PLLC, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal.

It is hereby ordered that the above-captioned proceeding be heard, submitted and determined upon the original record, briefs of counsel and oral argument, if requested by the parties.

It is further ordered that the appellant file an original and nine copies of a brief within thirty days of receipt of this order; the appellees to file a like number of briefs within thirty days of receipt of the appellant's brief, with any reply brief deemed necessary to be filed within fifteen days of receipt of appellees' brief.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX P

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2007, the following order was made and entered:

Eagle Research Corporation, Plaintiff Below, Respondent

vs.) No. 070375

Emerson Electric Co., Daniel Industries, Inc., and Daniel Measurement Services, Inc., Defendants and Third Party Plaintiffs Below

Daniel Measurement Services, Inc., Petitioner

vs.

Jim Butch, Third Party Defendant Below, Respondent

On a former day, to-wit, February 6, 2007, came the petitioner, Daniel Measurement Services Inc., by Ancil G. Ramey and Hanna B. Curry, Steptoe & Johnson, PLLC; John L. Tate and Jennifer L. Kovalcik, Sites & Harbison, PLLC; Robert J. McAughan, Jr., Locke Liddell & Sapp, LLP; and W. Michael Moore and Rita M. Biser, Moore & Biser, PLLC, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Putnam County, rendered on the 18th day of August, 2006, with the record accompanying the petition. Thereafter, on the 7th day of March, 2007,

came the respondent, Eagle Research Corporation, by John E. Sutter, Roger H. Miller, II and Roger A. Decanio, The Sutter Law Firm; and William C. Forbes, Forbes Law Office, its attorneys, and presented to the Court its written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Albright and Benjamin would grant.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX Q

IN THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH
CORPORATION,

Plaintiff,

v.

CIVIL ACTION NO.
03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT
SERVICES, INC., and
VALTRONICS, INC.,

Defendants.

v.

JIM BUTCH,

Third-Party Defendant.

DIRECT EXAMINATION OF RANDY PAGE

(Filed April 3, 2006)

* * *

[982] MR. FORBES: Yes, sir.

Q Let me hand you one of these documents marked super confidential and marked Plaintiff's Exhibit No. 700. Can you identify that?

A It is a table that has the – captures product sales by quantity, average price, average cost from

the years '99 to partial year of 2005 for both the FloBoss 103 and 104 products.

Q And to the best of your knowledge is that chart accurate in terms of the things you just described?

A To my personal knowledge the number of units sold looks correct, but the average selling price and costs do not look correct.

Q You're aware that that was prepared from the business records in Iowa and Houston, or some place by your lawyers, to reflect that?

A I did not prepare the document. It looks like [983] information that was obtained from our market research company, RSR.

Q And the information that RSR would have, would that be information that you would routinely – they would routinely keep in operating a business?

A We do a global market research study every year to compare our results against our competitors and we use a third party research firm to do that. So that they can talk to people and get information from customers – or competitors that's unbiased by us. And so they would typically call people out in the field and get information from them to compile this report for us.

MR. FORBES: I would move the admission of that document, Your Honor.

MR. TATE: No objection.

THE COURT: It may be admitted.

Q Now, let's flip it up here on the screen. Prior to 2001 there was no FloBoss 103/104, so you couldn't have sales figures for that, could you?

A That's correct.

Q But starting in 2002 when you came out with it, you sold 456 units?

A That's what it says.

Q And the average unit sales price was $877?

[984] A That's what it says, but I don't think that's accurate.

Q It should be a lot higher, shouldn't it?

A It should.

Q The –

A Can I explain?

Q Yeah, please do.

A Our order entry system, the way it works is it generates items, whether it is a complete unit, a flow computer or it might be a spare part. Either one is considered an item, And so what I think has happened here is that the number of items were listed – and of course, an item might have a different selling price. So a FloBoss would probably sell for in the neighborhood of $2,100, $2,200, but if they bought a spare part, it could be substantially less. And I think

perhaps that number, because it's so low, someone just did simple math looking at items, total sales and dividing it to come up with an average.

Q So if you sold 456 of them, it should be around $2,000 a unit?

A The flow, all of our products are highly configurable, so it's very hard, but I would say on average it's probably $2,100 to $2,200.

Q On average, if you can, back to this peripheral stuff. [985] When somebody comes in and asks to buy one of your flow computers, there's all kinds of widgets and gidgets you got to tailor to their gas flow computer?

A That's correct.

Q Do you have any idea what the average would be for tailoring one of those for their wells, on the average?

A It can go anywhere from it's bare minimum $800, it could go upwards to $3,500.

Q So you're looking in the neighborhood to buy this whole thing around $5,000?

A That's probably a little bit high for the 103.

Q $4,500?

A I'd say probably closer to $3,500.

Q $3,500. Are you like Mr. Butch, do you make fifty percent profit on those things?

A It depends on the construction of the unit. The more peripherals we sell, the less our margin. And typically our sales model is such that we use independent sales organizations, a representative channel, and it's very common that the representative actually buys all the peripheries, the solar panels, the radios, that kind of stuff, and that's their expense, not our's. And our profit would be somewhere in the neighborhood of gross profit on a 103 with an orifice gas measurement, 45 percent kind of range.

[986] Q Okay. And the same would be true on the 104 when you started selling it pretty much?

A The 104 is a different product. It's used for turbine measurement. It's got a different sensing element on the bottom and the sensing element is most of the cost of the flow computer, and because of its pressure transmitter sensors in the 104, its much cheaper than the 103.

Q So what would the average be for one of those units to sell?

A Probably in the $1,600 range.

Q And at 45 percent profit still, roughly?

A Roughly.

Q And with peripherals, how much would it average when you sold one with peripherals?

A $2,800 to $3,000.

Q So you're back to $5,000 or so a unit there?

A No, I said $2,800 to $3,000.

Q $3,000 a unit?

A Yeah.

Q At 45 percent profit. Do you have any dispute about the numbers of sales on the FloBoss 103 in 2003?

A They appear to be in the ballpark.

Q In 2003 on the 104?

A The units sold looks correct, the average unit selling [987] price looks a little bit high, but again I don't know what configuration of this device, if its got a bunch of peripherals or not.

Q I understand that. Now, in 2004 the FloBoss 103, you sold almost 3,000?

A That's correct.

Q And only 44 of these 104's?

A That's correct.

Q And then 2005 you sold 3,554?

A That's correct.

Q And 2005 you sold 115?

A Those are partial years. I'm not sure what that year was.

Q 2005 was a partial year?

A That's what it says.

Q Are you one of those guys that can tell you off the top of your head what 45 percent of $17,000 is?

A Afraid not.

Q I'm not either.

* * *

APPENDIX R

PLAINTIFF'S EXHIBIT 592

Mike Johnson	To:	Jim Hall <JHALL@danielind.com>
02/24/00 02:58 PM	cc:	GENEP@micromotion.com, jsitton@danielind.com, NIngram@danielind.com, Jim Burdett/DMS@DMS, Lee Burkett/DMS@DMS, Scott Tanner/DMS@DMS, Ed Morrison/DMS@DMS
	Subject:	RE: Eagle Research Corporation Confidentiality Agreement

Jim:

It appears that the information and the ERC instrument you are requesting are restricted by the confidentiality agreement between DMS and ERC. Consequently, please contact ERC directly to obtain the desired information. Alternatively, DMS would be happy to provide access to a test unit upon receiving written permission from ERC.

Their contact information is:

Mr. Jim Butch
President
Eagle Research Corporation
4036 Teays Valley Road
P.O. Box 688
Scott Depot, WV 25580

Phone: 304.757.6585
Fax: 304.757.3332

Mike

Jim Hall
<JHALL@danielind.com>
02/24/00 01:51 PM

To: "mjohnson@dms.danielind.com"
<mjohnson@dms.danielind. com>

cc: "Perkins, Gene [MMI/BOU]"
<GENEPmicromotion. com>,
Neal Ingram <NIngram@danielind.com>,
J D Sitton <jsitton@danielind.com>

Subject: RE: Eagle Research Corporation Confidentiality Agreement

Mike,

During a meeting with Hanover, Gene Perkins and Neal Ingram were told that Hanover wants to deal directly with Eagle to purchase flow computers. They indicated that if we could supply a comparable unit, they would consider purchasing the units from Daniel. We have not requested any info on the Eagle unit from DMS. I did ask Jim Burdett to loan us one of the units DMS had purchased for a couple of days in order to compare its temperature performance with that of the Spectra 100.

We certainly wouldn't want DMS to violate any legal agreement; however, I don't see how this violates the confidentiality agreement, since any potential customer

(such as Hanover) would be expected to run comparative tests on the units he was considering.

Jim

-----Original Message-----

From: mjohnson@dms.danielind.com [mailto:mjohnson@dms.danielind.com]

Sent: Thursday, February 24, 2000 1:18 PM

To: jburdett@dms.danielind.com; stanner@dms.danielind.com; emorriso@dms.danielind.com; crobles@dms.danielind.com; mdorn@dms.danielind.com; jhall@danielind.com; ningram@danielind.com

Cc: jsitton@dms.danielind.com; pbrehm@danielind.com; rpalmer@danielind.com; lburkett@dms.danielind.com

Subject: Eagle Research Corporation Confidentiality Agreement

Gentlemen:

The recent activity between DMS and others has led to increased interest in the electronic data collection devices DMS purchases from Eagle Research Corporation (ERC). This has resulted in numerous questions about the function, specifications, testing, application, and operation of the ERC instrument.

Please be advised that DMS is under legal obligation through our confidentiality agreement with ERC to not disclose any functional, specification, test, application, operation, or pricing information, either written or verbal, to anyone outside of DMS. Unfortunately, this

restricts DMS from sharing any information with Daniel, Fisher-Rosemount and/or Emerson. We have similar agreements with Bristol, Flow Automation, Barton, and Omni which covers all the information received during the DMS investigation and subsequent selection of ERC as our main vendor for data collection instrumentation, and on-going discussions for the next generation instrument.

Requests for any information relating to the ERC instrument should be directed to my attention. No information related to the ERC instrument is to be released by DMS personnel to anyone outside DMS without written permission from myself or Lee Burkett. The above also applies to information on the Bristol, Flow Automation, Barton, and Omni flow computers and is to ensure that we do not violate the agreements in place.

Any written information that has been released outside of DMS concerning ERC, Bristol, Flow Automation, Barton, or Omni should be asked, in writing, to be returned.

Mike Johnson To: Jim Burdett/DMS@DMS,
Scott Tanner/DMS@DMS,
Ed Morrison/DMS@DMS,
Chris Robles/DMS@DMS,
Mike Dom/DMS@DMS,
jhall@danielind.com,
ningram@danielind.com

02/24/00 01:17 PM cc: JD Sitton/DMS@DMS,
pbrehm@danielind.com,
rpalmer@dnaielind.com,
Lee Burkett/DMS@DMS

Subject: Eagle Research Corporation
Confidentiality Agreement

Gentlemen:

The recent activity between DMS and others has led to increased interest in the electronic data collection devices DMS purchases from Eagle Research Corporation (ERC). This has resulted in numerous questions about the function, specifications, testing, application, and operation of the ERC instrument.

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Requests for any information relating to the ERC instrument should be directed to my attention. No information related to the ERC instrument is to be released by DMS personnel to anyone outside DMS

without written permission from myself or Lee Burkett. The above also applies to information on the Bristol, Flow Automation, Barton, and Omni flow computers and is to ensure that we do not violate the agreements in place.

Any written information that has been released outside of DMS concerning ERC, Bristol, Flow Automation, Barton, or Omni should be asked, in writing, to be returned.

CONFIDENTIAL Use and Disclosure Restricted by Order of the Putnam County Circuit Court of West Virginia, Civil Action No. 03C119

APPENDIX S

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 07-

EAGLE RESEARCH CORPORATION,
PLAINTIFF BELOW, RESPONDENT

vs.

DANIEL MEASUREMENT SERVICES INC.,
DEFENDANT, PETITIONER

HONORABLE O. C. SPAULDING, JUDGE
CIRCUIT COURT OF PUTNAM COUNTY
CIVIL ACTION NO. 03-C-119

PETITION FOR APPEAL

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* * *

[17] When first questioned under oath, *Eagle's president admitted that none of Eagle's alleged trade secret items were, in fact, secret.* He also did not have any evidence that the defendants' products incorporated these alleged trade secrets.[72] Despite this testimony, Eagle continued to advance its trade secret claim by designating an electrical engineering witness and a report on such claim.[73] When questioned under oath, however, Eagle's electrical engineer admitted that Eagle's alleged trade secrets were not secrets and that there was no evidence of any trade secret violations.[74] After being reminded by the trial

[72] *See* Butch Depo. Tr. at 91-94, Ex. I, Defs' SJ Cross-Motion.

[73] *See* Def. Tr. Ex. 101 (same as Ex. 6, Defs' Judgment/New Trial Motion Reply).

[74] Trial Tr. at 691-98, 702-03. *See also* Nutter Depo. Tr. (6/20/2005) at 162, Ex. J, Defs' SJ Cross-Motion ("Q. Why didn't you even mention the concept of a linear and a switching

(Continued on following page)

court that it could award attorney fees if Eagle were unsuccessful in advancing its claim, Eagle dismissed its trade secret claim.

After it dismissed its trade secret claim, with prejudice, Eagle amended its complaint to assert a functionally-identical claim that DMS breached the confidentiality agreement. As with its trade secret claim, Eagle's confidentiality claim arose from the alleged use of confidential features in two of the Fisher products.[75] Eagle's engineering witness, the same witness used for its trade secret claim, provided a new report purportedly showing that *entirely different Fisher products,* the FlowBoss 103 and 104, included features that were previously found on an Eagle product sold by Eagle before execution of the confidentiality agreement. He conceded under oath, however, that the allegedly common features were either: (i) not secret (and thus not protectable under the

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regulator in your report?" A. [Dr. Nutter] "The – at that point in time, I just didn't have the concept really tightened up. . . . Now, since that point, we've looked at Jim Butch's deposition . . . and this morning you have convinced me that that *is a bunch of off-the-wall things that probably are not trade secrets. I agree."* Q. "They're not trade secrets?" A. *"Correct. I agree. I agree."* (emphasis added)).

[75] Eagle later alleged that DMS violated the agreement by disclosing information to DMS' advisor and affiliate, Randy Page, an employee of Daniel's Flow Computer Division.

71

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No. 07-384

IN THE

Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,
Petitioner,

v.

EAGLE RESEARCH CORP.,
Respondent.

On Petition For A Writ Of Certiorari To The Circuit Court Of Putnam County, West Virginia

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONER 1

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DUE PROCESS JURISPRUDENCE 2

II. THE DECISION BELOW RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE TO STATE COURT LITIGANTS 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Giaccio v. Pennsylvania,
382 U.S. 399 (1966) 2

Goldberg v. Kelly, 397 U.S. 254 (1970) 2

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 2, 6, 7, 8

Murphy v. Lischitz,
49 N.Y.S.2d 439 (Sup. Ct. 1944) 3

Ohio Bell Tel. Co. v. Pub. Utils. Comm'n,
301 U.S. 292 (1937) 4, 7

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 5

TXO Prod. Corp. v. Alliance Res. Corp.,
509 U.S. 443 (1993) 2, 4

U.S. Naval Inst. v. Charter Commc'ns, Inc.,
936 F.2d 692 (2d Cir. 1991) 3

Univ. Computing Co. v. Lykes-Youngstown Corp.,
504 F.2d 518 (5th Cir. 1974) 3

REPLY BRIEF FOR PETITIONER

When one cuts through the factual mischaracterizations and legal irrelevancies of respondent's brief in opposition, two simple and undeniable points emerge. First, a West Virginia jury returned a $10.5 million verdict against Daniel Measurement Services, Inc. ("DMS") in the absence of *any* record evidence regarding respondent's "reasonably ascertainable losses." Pet. App. 44a. Second, that verdict was never subjected to any meaningful judicial review by either the trial court or the West Virginia Supreme Court of Appeals. The jury's arbitrary imposition of a factually insupportable damages award and the West Virginia courts' failure to undertake meaningful review of that award deprived DMS of the due process rights guaranteed to it by the Fourteenth Amendment. There is an urgent need for this Court to grant review of this case to reiterate and reinforce the fundamental due process rights to which litigants in West Virginia—and state courts throughout the Nation—are entitled.

None of respondent's contrary arguments can obscure this blatant due process violation or undermine the compelling need for this Court's review. Respondent's attempt to muster evidentiary support for the breach-of-confidentiality award is unavailing because respondent itself concedes that the only evidence upon which the jury could have conceivably based its verdict was the testimony concerning the profits of DMS's corporate affiliate, Emerson. Opp. 5. But the trial judge expressly refused to give an instruction equating respondent's losses with DMS's corporate profits (Pet. App. 42a, 43a-45a)—which eliminates the only possible evidentiary support for the verdict. Respondent is also wrong to suggest that the West

Virginia courts undertook constitutionally adequate judicial review of the verdict. Due process requires more than the cursory level of review that took place here. Indeed, while the trial court acknowledged the lack of evidentiary support for the breach-of-confidentiality damages, it refused to correct this error, and the West Virginia Supreme Court of Appeals denied review altogether. DMS thus had no meaningful opportunity to obtain relief from the jury's arbitrary verdict. Finally, respondent's attempt to evade the due process principles set forth in cases such as *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), is similarly ineffectual because this Court's precedent makes clear that *all* damages awards—regardless of the label attached to them—must comport with fundamental due process requirements. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). The West Virginia courts' failure to afford those minimal constitutional protections in this case warrants review by this Court.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DUE PROCESS JURISPRUDENCE.

The Due Process Clause guards against the arbitrary exercise of state power and requires a minimum level of rationality in a State's judicial procedures. *See, e.g., TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 467 (1993) (Kennedy, J., concurring in part and concurring in the judgment); *see also* Br. of National Association of Manufacturers at 9 ("This Court has made clear that due process requires state actors deciding whether to deprive a litigant of his or her property to meet minimum procedural safeguards demanded by rudimentary due process . . . .") (citing *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970)). DMS was denied these fundamental

constitutional protection when the West Virginia courts failed to undertake meaningful judicial review of a multimillion-dollar jury award that lacks all evidentiary support.

Respondent contends that the $10.5 million damages award for breach of the confidentiality agreement is based on "sufficient evidence of record" (Opp. 2), but then fails to identify any such evidence. The only evidence to which respondent points—testimony regarding the profits of DMS's corporate affiliate, Emerson (*id.* at 5)—is demonstrably insufficient to support the jury's verdict because the jury was instructed that any damages awarded for breach of the parties' confidentiality agreement must be based on "reasonably ascertainable losses" to respondent, rather than upon profits earned by DMS and its corporate affiliates. Pet. App. 44a. Thus, while a defendant's profits may be an appropriate measure of damages in some cases, this is not such a case because the jury was not instructed that it could use Emerson's profits as the basis for calculating respondent's losses. Respondent's lengthy discussion of *U.S. Naval Institute v. Charter Communications, Inc.*, 936 F.2d 692 (2d Cir. 1991), *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974), and *Murphy v. Lischitz*, 49 N.Y.S.2d 439 (Sup. Ct. 1944), is therefore utterly irrelevant because, whether or not a defendant's profits can serve as the basis for determining a plaintiff's losses in *some* cases, it cannot do so in *this* case.[1]

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[1] Respondent is wrong to suggest that DMS somehow failed to preserve its right to seek this Court's review of the unsubstantiated breach-of-confidentiality verdict by failing to object to respondent's evidence regarding Emerson's lost profits or to respondent's closing argument. Opp. 16, 19. It is not the tes-

The imposition of a verdict that lacks all evidentiary support is squarely at odds with the due process protections repeatedly articulated by this Court. *See, e.g., TXO*, 509 U.S. at 453-54 (plurality op.). Respondent is therefore incorrect when it asserts that DMS "has not cited any cases holding that it has a federal constitutional right to have this Court determine whether the state court verdict against it is supported by the evidence." Opp. 8. A state court verdict that lacks *all* evidentiary support is an arbitrary deprivation of property, which this Court has long recognized constitutes a violation of due process. *See, e.g., Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 302 (1937) (due process protects "the individual against arbitrary action" by the State); *TXO*, 509 U.S. at 467 (Kennedy, J., concurring in part and concurring in the judgment). DMS is not contending, as respondent suggests, that every state court litigant has "a federal constitutional right to have this Court determine whether the decisions below were correctly made" (Opp. 9)—it is arguing that the Constitution protects against state court verdicts that are completely devoid of evidentiary support and that are never subject to meaningful judicial review. These circumstances transcend mere error and rise to the level of an arbitrary deprivation of prop-

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[Footnote continued from previous page]

timony presented by respondent or its closing argument that constitutes the constitutional violation in this case. DMS was deprived of its due process rights by the jury's factually insupportable multimillion-dollar breach-of-confidentiality verdict and by the absence of any meaningful judicial review of that verdict. DMS raised that argument below in briefing before the West Virginia Supreme Court of Appeals, and it is therefore properly preserved for review in this Court. Pet. for Appeal 49.

erty in violation of the fundamental guarantees embodied in the Due Process Clause.[2]

The absence of meaningful judicial review is evident from the fact that the trial court recognized the lack of evidentiary support for the breach-of-confidentiality damages, expressed its "concern[]" with that damages award, and then inexplicably left the damages award undisturbed. Pet. App. 12a. The lack of meaningful post-trial review was compounded by the refusal of the West Virginia Supreme Court of Appeals to hear DMS's appeal.[3] Thus, far from "be[ing] provided ample opportunity to seek relief through the judicial process" (Opp. 11), the state judicial system did not afford DMS any viable recourse against the jury's arbitrary and irrational award of breach-of-confidentiality damages.

Respondent contends that the trial court's reduction of the breach-of-contract damages awarded against DMS establishes that the trial court also undertook a meaningful review of the breach-of-

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[2] Respondent's contention that DMS's alleged "wrongful conduct"—*i.e.*, its liability for breach of contract and breach of the confidentiality agreement--is a basis for precluding it from "question[ing] how the jury arrived at" the $10.5 million verdict has absolutely no legal—or logical—support. Opp. 23. Respondent's argument would foreclose any defendant found liable at trial from challenging the size of the damages award against it—a proposition that is fundamentally at odds with this Court's due process jurisprudence. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (adjudicating a defendant's challenge to the size of a punitive damages award).

[3] Respondent successfully evaded any substantive scrutiny of the $10.5 million verdict by quickly and unilaterally withdrawing its own appeal, for which discretionary review had been granted, in order to foreclose DMS from cross-assigning the breach-of-confidentiality award as error.

confidentiality award. Opp. 4. But regardless of whether the trial court's review of the breach-of-contract award was constitutionally meaningful, the fact remains that the trial court recognized the absence of evidentiary support for the breach-of-confidentiality award but nevertheless failed to do anything about it. Such abdication of the judicial function cannot constitute constitutionally adequate review. Similarly, the fact that DMS was able to submit a lengthy brief to the West Virginia Supreme Court (*id.* at 12) in an (ultimately unsuccessful) effort to persuade the court to accept its case for review cannot substitute for substantive appellate review of the *merits* of DMS's challenge to the legally and factually flawed damages award.

The absence of meaningful review—at either the trial or appellate level—of the breach-of-confidentiality award deviates from longstanding common-law procedures and thus cannot be reconciled with the Fourteenth Amendment's due process protections. *Cf. Oberg*, 512 U.S. at 432 n.10; *see also* Br. of Product Liability Advisory Council, Inc. at 12 ("By not affording petitioner the right to appellate review of the jury's verdict, and by not requiring any reviewing court to set forth its rationale for sustaining the verdict, West Virginia's procedures as implemented in this case deviate from the common law.").

Respondent's effort to distinguish *TXO*, *Oberg*, and *State Farm*—and to immunize its damages award from the constitutional protections recognized in those decisions—is ineffectual. Opp. 10. The fact that those decisions were rendered in the punitive damages context does not undermine their force in the compensatory damages setting because they are premised on fundamental common-law safeguards

that are applicable in *all* cases. Indeed, "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century." *Oberg*, 512 U.S. at 422 n.2. The Constitution protects all civil litigants against arbitrary state action, including irrational compensatory damages awards that lack any evidentiary foundation. This protection against arbitrary deprivations of property is the essential promise of due process. *See Ohio Bell Tel. Co.*, 301 U.S. at 302.

This Court's review is warranted to vindicate these fundamental due process principles and to reconcile the decision below with this Court's due process jurisprudence.

II. THE DECISION BELOW RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE TO STATE COURT LITIGANTS.

Nothing in respondent's opposition brief can diminish the importance of this case to state court litigants in West Virginia and in other States that provide for purely discretionary appellate review in civil actions. *See* Pet. for Writ of Cert. 16 n.1. As the three *amicus curiae* briefs filed in support of DMS underscore, this case affords the Court an important opportunity to ensure that state court litigants are not exposed to arbitrary and irrational verdicts that are insulated from all meaningful judicial review. "The procedures used by the West Virginia courts in this case . . . fell woefully short of what the Due Process Clause requires." Br. of Product Liability Advisory Council at 4. Not only was there "no review of the jury's decision by a court that did not preside over the trial—as was standard at common law"—but there was also a complete absence of a "reasoned explanation for [the trial court's] decision to let the

jury award stand." *Id.* Such deprivations of fundamental due process rights seem to occur with alarming frequency—especially for out-of-state litigants—in the West Virginia judicial system. *See* Br. of Washington Legal Foundation at 12-16.

The implications of this case therefore extend well beyond the parties to this dispute. If the decision below is left undisturbed, West Virginia and other States will be given virtually unbridled discretion to structure and operate their court systems in a manner that obliterates fundamental due process safeguards—such as the right to obtain meaningful judicial review of a verdict that lacks any evidentiary support. This case affords the Court the opportunity to clarify the scope of these due process protections and to reinforce these fundamental constitutional safeguards in the face of state court encroachments on litigants' constitutional rights. This Court has often stepped in to review state court procedures that raise serious constitutional concerns (*see, e.g.*, *Oberg*, 512 U.S. at 435), and there is a compelling need for it to do so again here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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70

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No. 07-384

IN THE

Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,
Petitioner,

v.

EAGLE RESEARCH CORP.,
Respondent.

On Petition for a Writ of Certiorari
To the Circuit Court
Of Putnam County, West Virginia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 07-384

DANIEL MEASUREMENT SERVICES, INC.,
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Respondent.

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Pursuant to Rule 37 of the Rules of this Court, *amici curiae* request leave to file the accompanying brief in support of the Petition for a Writ of Certiorari.[1]

[1] Respondents' counsel did not consent to the filing of an *amici curiae* brief in this action. Counsel of record for all par-

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance,

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ties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. In accordance with Rule 37.6, *amici curiae* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel have made a monetary contribution to its preparation or submission.

and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

Amici seek leave to file a brief in this case because the issue of whether procedures employed by a court to sustain a compensatory damage award meet the minimum requirements of the Due Process Clause is of importance to each and every business in this country. If state courts are permitted to enter awards that are completely unsupported by the evidence, then businesses will be placed at substantial risk of arbitrary deprivations of their property. This risk is magnified, where, as here, summary judgment is routinely denied, post-trial review is nominal at best, and appellate review is unavailable.

The proposed amici curiae brief does not repeat the Petitioner's arguments. Rather, the brief begins by considering the public policy underlying the history and development this Court's due process jurisprudence and the principle that this tradition does not permit arbitrary compensatory damage awards. The brief then considers other instances in which this Court and others have, on the basis of procedural due process, found that a state cannot deprive an individual of life, liberty, or property in absence of supporting evidence. Finally, the brief addresses

and seeks to alleviate any potential concern of this Court that its intervention in this case could disturb the basic judicial structure of states that lack an intermediate appellate court or appellate review as a matter of right. The brief also explains why granting certiorari in this case will not place this Court in the position of acting as a court of last resort for every alleged excessive compensatory damage award.

Accordingly, a*mici* request that the Court grant this motion.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THIS COURT'S DUE PROCESS JURISPRUDENCE REQUIRES SOME MINIMUM LEVEL OF PRE- AND POST-TRIAL REVIEW, AND EVIDENTIARY SUPPORT, TO SUSTAIN A DAMAGE AWARD 6

A. History and Development of Due Process.. 6

B. Procedural Due Process Does Not Permit Unsupported Compensatory Damage Awards 11

II. A DAMAGE AWARD WITHOUT EVIDENTIARY FOUNDATION IS INCONSISTENT WITH DUE PROCESS..... 14

III. WHAT DECIDING THIS CASE WILL AND WILL NOT DO 17

A. This Case Presents the Opportunity to Clarify and Reaffirm That Due Process Does Not Permit Arbitrary Awards 17

B. This Case Will Not Unduly Interfere With State Judicial Sovereignty or Make This Court a Final Arbiter of Every Excessive Compensatory Damage Award..... 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Biggs v. Village of Dupo,
892 F.2d 1298 (7th Cir. 1990) 15

Brown v. Mississippi, 297 U.S. 278 (1936) 17

Burnham v. Superior Court of Cal., Marin County, 495 U.S. 604 (1990) 10

Carey v. Pipus, 435 U.S. 247 (1978) 15

Cooper Indus., Inc., v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 13

Crookston v. Fire Ins. Exchange,
817 P.2d 789 (Utah 1991) 12

Ducker v. Wood, 99 Eng. Rep. 1092 (K.B. 1786) 11

Douglas v. Buder, 412 U.S. 430 (1973) 15

Duncan v. Louisiana, 391 U.S. 145 (1968) 7

Federal Trade Comm'n v. Kuykendall,
312 F.3d 1329 (10th Cir. 2002), *vacated on reh'g en banc*, 371 F.3d 745 (2004) 16

Gasperini v. Center for Humanities,
518 U.S. 415 (1996) 12

Goldberg v. Kelly, 397 U.S. 254 (1970) 9

Hetzel v. County of Prince William,
89 F.3d 169 (4th Cir. 1996) 15

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512 U.S. 415 (1993) 5, 10, 11, 17

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Malloy v. Hogan, 378 U.S. 1 (1964) 8

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Morrissey v. Brewer, 408 U.S. 471 (1972)..... 9

Murray's Lessee, v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855)..... 7

Pacific Mut. Life. Ins. Co. v. Haslip,
499 U.S. 1 (1991)..... 10, 13

Palko v. Connecticut, 302 U.S. 319 (1937),
overruled by Benton v. Maryland,
395 U.S. 784 (1969)..... 8

Price v. City of Charlotte,
93 F.3d 1241 (4th Cir. 1996)..... 15

Ramsey v. American Air Filter Co.,
772 F.2d 1303 (7th Cir. 1985)..... 15

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Tumey v. Ohio, 273 U.S. 510 (1927) 17

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CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. V 6

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

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[1] Respondents' counsel did not consent to the filing of an *amici curiae* brief in this action. Counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae*'s intention to file this brief. In accordance with Rule 37.6, *amici curiae* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel have made a monetary contribution to its preparation or submission.

more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

STATEMENT OF THE CASE

Amici adopt and incorporate Petitioner's statement of the case.

SUMMARY OF ARGUMENT

This case presents an important constitutional issue of procedural due process: whether a court may deprive a defendant of property by allowing a compensatory damage award that has no basis in the evidence to stand with no more than cursory pre- and post-trial procedures and no appellate review.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Here, the trial court's actions and inaction exemplify the complete lack of the most basic, fundamental procedures to ensure due process. Two statements of the trial court judge demonstrate how a jury reached a multimillion dollar compensatory damage award, without evidence that the plaintiff

experienced an actual loss, for an alleged breach of an oral contract and disclosure of trade secrets, and why that award was permitted to stand.

Early in the case, the trial court took a troubling approach in deciding a defendant's motion for summary judgment:

> [If] you've done your homework on me and you'll know what my reversal rate is. And I will tell you in the field of civil law, civil litigation, the only time I've been reversed in 14 years is when I grant summary judgment. There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed. Not every time literally, but that's where it is. Our system favors taking it to a jury. And I'm going to allow all of these to go to a jury. Plain and simple. All of your's, all of the plaintiff's. Even the individual one against Mr. Butch. I don't know how you are going to argue all of this and present it to a jury. That will be your problem.

App. at 47a. In other words, the trial court expressed a blanket policy against summary judgment, even when it had concern that the facts accepted in the light most favorably to the plaintiff might not support a claim.

The court continued this hands-off approach following the trial in deciding whether to order a new trial on damages. Although the court noted that it was "most troubled" by and "struggling with" the

measure of damages in the case, the court concluded that "I'm not going to reduce it, though I am concerned with it." App. at 10a, 12a. The court expressed bewilderment at the $10.5 million in consequential damages for breach of a confidentiality agreement, noting that "I did not instruct the jury that they could take [the defendants'] profits away from them. Maybe that was what the law allowed, maybe that was a proper way, but I didn't instruct the jury that way." App. at 12a-13a. The court went on to conclude:

> And I'll be frank with you, I cannot recall now whether the plaintiffs at that time said "Judge, this is a wrong instruction, you ought to be instructing the jury that they can base the measure of damages on the lost – based on taking away profits." I don't have a memory of that. I don't think you did, I'm not sure. I can't wade through them all at this stage, and so I'm going to leave that as it is. I'm going to deny the defense motion in regard to that as well.

App. at 13a. This type of lackadaisical deliberation and abrogation of responsibility, at both the pre- and post-trial phases, raises serious questions under the Due Process Clause for the consideration of this Court. The combined import of these two actions posed an unacceptable risk of a standardless deprivation of property.

Moreover, both the trial court's approach to summary judgment and the damage award seemed premised on the availability of appellate review. Yet, West Virginia has a single appellate court in which review is discretionary. Indeed, the West Virginia

Supreme Court of Appeals denied the defendant's petition for appeal in this case. App. at 27a-28a. This further underscores the need for adequate procedural safeguards at the trial court level to comport with the minimum requirements of the Due Process Clause.

The line of jurisprudence that formed the underlying basis of this Court's conclusion in *Honda Motor Co. v. Oberg* that procedural due process requires the amount of a punitive damages award to be subject to "meaningful and adequate" post-verdict or appellate review was not confined to punitive damage awards. 512 U.S. 415, 442 (1993) (invalidating an Oregon law that precluded judicial review of the amount of punitive damage awards). In fact, this Court specifically recognized in *Oberg*, "Since there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century, no effort has been made to separate out the two classes of cases." *Id.* at 442 n.2. The case at bar provides an important opportunity for this Court to reaffirm and clarify the constitutional principle that the Due Process Clause requires some meaningful level of pre- and post-trial review as a safeguard against arbitrary or excessive compensatory damage awards. These are fundamentals of our system of jurisprudence that must be preserved.

ARGUMENT

I. This Court's Due Process Jurisprudence Requires Some Minimum Level of Pre- and Post-Trial Review, and Evidentiary Support, to Sustain a Damage Award

The Fifth and Fourteenth Amendments to the Constitution of the United States protect against the unfair deprivation of "life, liberty, or property, without due process of law." U.S. CONST. AMENDS. V, XIV. § 1. The words "due process" have developed over time to incorporate safeguards on both procedural and substantive elements—assuring fair notice and opportunity to be heard and proceedings that are neither conducted in an arbitrary manner nor lead to an arbitrary result. Exactly what procedures fulfill this constitutional right is the product of a complex history and tradition, and one that has proven essential to the analysis of the scope of the protection. Today, this Court is asked to consider whether that history and tradition constitutionally protects a defendant from an arbitrary compensatory damage award that has no basis in the evidence or jury instructions, that was not subject to even the most rudimentary post-trial review, and that received no appellate review.

A. History and Development of Due Process

Due process is the "oldest of our civil rights." Edward L. Rubin, *Due Process and the Administrative State*, 72 Cal. L. Rev. 1044, 1044 (1984). This necessity of fair and impartial process derives from two sources of English law. *See* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 Const. Comment. 339, 340 (1987). One is

Chapter 39 of the Magna Carta, which established that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by *the law of the land*." Magna Carta ch. 39 (Eng. 1215) (emphasis added); *see also Duncan v. Louisiana*, 391 U.S. 145, 169 (1968). The second source, employing the words "due process," comes from an English statute of 1354 which provided "[t]hat no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due Process of the Law." 28 Edw. 3 ch. 3 (1354).

From these beginnings, the concept of a guaranteed right of due process gradually became embedded in American legal culture and tradition. Although the Fifth Amendment's due process clause passed with little recorded debate on the issue, it prompted several of the early states, none of which had a state constitutional due process provision, to adopt similar language. *See* Stephen Williams, *'Liberty' In the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions*, 53 U. Colo. L. Rev. 117, 121-24 (1981). Prior to the adoption of the Fourteenth Amendment, however, due process was a right that existed, but one that was rarely discussed. This Court only addressed the meaning of due process on a few occasions, holding that the challenged process must either conflict with the text of another constitutional provision or with "those settled usages and modes of proceeding existing in the common and statute law of England." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855); *see also United States v. Betsy*, 8 U.S. 443, 451 (1808)

(stating that the Fifth Amendment due process clause "means by due process of the *common* law") (emphasis in original).

Extension of due process to state action under the Fourteenth Amendment has led to considerable increase in the scope and use of the protection, and greater refinement in its meaning. *See Hurtado v. California*, 110 U.S. 516, 532 (1884) ("[T]hese broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify. . . more comprehensive interpretation.").

Until the 1960's, the history and tradition of challenged procedures generally determined their constitutional adequacy. *See, e.g., Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (holding history and tradition could permit a state to deny protection against double jeopardy), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969). While a state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness," it may not do so if "it offends some principle of justice so rooted in the traditions or conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934) (Cardozo, J.), *overruled on other grounds, Malloy v. Hogan*, 378 U.S. 1 (1964).

During the 1960's and 1970's, the Court moved toward a more expansive understanding of due process. *See, e.g., Malloy v. Hogan*, 378 U.S. 1, 15 (1964) ("[C]ontinuing re-examination of the constitutional conception of Fourteenth Amendment 'due process' of law is required, and that development of the com-

munity's sense of justice may in time lead to expansion of the protection which due process affords."). "Fundamental fairness" emerged as the analytical tool to guide alleged due process deprivations and expand its reach. *See Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (requiring evidentiary hearing before termination of benefits by welfare authorities). This Court has made clear that due process requires state actors deciding whether to deprive a litigant of his or her property to meet minimum procedural safeguards demanded by rudimentary due process, which include affording the recipient the opportunity to confront and cross-examine witnesses, to retain an attorney, and to present oral evidence to an impartial decision maker, whose conclusion must rest solely on the legal rules and evidence adduced at the hearing. *See id.* at 270-71.

The modern test for determining the adequacy of the process used recognizes that "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). This Court has recognized three distinct factors that guide the extent of the necessary procedures: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335. The Court requires this balancing of the public

and private interests "[t]o assure fairness." *Id.* at 348.

The once dispositive role of history and tradition in analyzing procedural due process claims, however, has not been supplanted. *See Pacific Mut. Life. Ins. Co. v. Haslip*, 499 U.S. 1, 36 (1991) (Scalia, J., concurring) (criticizing *Mathews* and other due process opinions for "indiscriminately appl[ying] balancing analysis to determine 'fundamental fairness'" without regard for historical practice). Other recent jurisprudence suggests the resurgence of history and tradition as primary factors in procedural due process review. *See, e.g., Honda Motor Co. Ltd. v. Oberg*, 512 U.S. 415, 421 (1994) (examining deviation from common law procedures in the awarding of excessive punitive damages). *Burnham v. Superior Court of Cal., Marin County*, 495 U.S. 604, 619 (1990) (holding that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of traditional notions of fair play and substantial justice") (internal quotations omitted); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729-30 (1988) (considering tradition and history to reaffirm that Due Process Clause does not bar application of the forum state's statute of limitations to claims that in their substance are and must be governed by the law of a different state). It is against this backdrop that history, tradition and principles of fundamental fairness give rise to a constitutionally protected right to some minimum level of trial court procedures, sufficient evidence in the record, and post-trial review to guard against arbitrary awards of damages.

B. Procedural Due Process Does Not Permit Unsupported Compensatory Damage Awards

Judicial review of damage awards is a firmly embedded common law practice throughout this country and has its roots in English law and tradition. As Justice O'Connor stated plainly when this Court applied due process guarantees to a punitive damage award in *TXO Production Corp. v. Alliance Resources Corp.*, "courts at common law in England traditionally would strike any [damages] award that appeared so grossly disproportionate as to evidence caprice, passion, or bias." 509 U.S. 443, 476 (1993) (O'Connor, J., dissenting) (footnote omitted). Lord Mansfield was also led to comment that "there was no doubt but that the Court had the power of taking the opinion of a second jury in any case where the damages were excessive." *Ducker v. Wood*, 99 Eng. Rep. 1092 (K.B. 1786). This was true in cases involving both compensatory and punitive awards.

In *Oberg*, where this Court struck down an excessive punitive damages award on procedural due process grounds, Justice Stevens noted that "[a]s in many early cases, it is unclear whether this case specifically concerns punitive damages or merely ordinary compensatory damages," and "[s]ince there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century, no effort has been made to separate out the two classes of cases." 512 U.S. at 423 n.2. Given the long, and seemingly undisputed, history in which compensatory and punitive damages were reviewed for excessiveness, and that no attempt at differentiation was made at common law to ele-

vate one type of recovery for the purpose of establishing a unique constitutional right, there is no basis for separate treatment under due process. Such a distinction in the type of damages covered is unnecessary and improper for purposes of analyzing the adequacy of procedures under the Due Process Clause.

That this Court has not squarely addressed the issue of procedural due process with regard to compensatory damages should not suggest it does not apply. Indeed, the meaning of "due process of law" was sparsely discussed for the first hundred years following passage of the Fifth Amendment. Furthermore, lower courts, realizing the common law authority to overturn excessive awards, traditionally used remittitur to accomplish this same objective. *See e.g., Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 802 (Utah 1991) ("After a jury returns a damage award in a civil case, the most common way for the losing party to challenge the amount of the award is to move for a new trial or remittitur. . . ."). This Court has also stated that district courts' "discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Gasperini v. Center for Humanities*, 518 U.S. 415, 433 (1996) (holding that New York's law controlling compensatory awards for excessiveness or inadequacy can be given effect without violating the Seventh Amendment).

The traditional review process of remittitur illustrates a court's power to review the procedures used in awarding compensatory damages, and that this review must be protected under due process. The fact that remittitur is used to reduce both compensa-

tory and punitive damages awards further undercuts any distinction that would warrant separate constitutional treatment. Similarities in how courts' determine amounts for punitive damages and non-economic compensatory damages such as pain and suffering also demonstrate a need for constitutional safeguards. *See* Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 Harv. J. L. & Pub. Pol'y 231, 258-61 (2003) (arguing that the arbitrary nature of non-economic damages awards demand constitutional due process protections); *see also* Robert Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L.J. 859, 907-08 (1991) (arguing that non-economic compensatory damages and punitive damages are so similar that they "cannot be analytically distinguished"). Where procedures for awarding punitive damages parallel those for compensatory recovery, there is simply no reason to create a constitutional distinction. *See Cooper Indus., Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 446-47 (2001) (Ginsburg, J., dissenting) ("One million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage.").

Moreover, as this Court expressed in *Haslip*, the level of discretion allowed in determining punitive damages "is no greater than that pursued in many familiar areas of the law as, for example, deciding . . . appropriate compensation for pain and suffering or mental anguish. As long as the discretion is exercised within reasonable constraints, due process is satisfied." 499 U.S. at 20 (footnote omitted). Justice Scalia, in *TXO Production Corp.*, more directly concluded this essential point: "Procedural due process

also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict, and judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)." 509 U.S. at 471 (Scalia, J., concurring).

History, tradition, fundamental fairness and the past decisions of this Court all support the conclusion that due process requires courts to provide adequate procedural safeguards against the risk of erroneous deprivation of property through a compensatory damage award inconsistent with the evidence. This Court should, therefore, grant certiorari and remove any doubts as to this important constitutional right.

II. A DAMAGE AWARD WITHOUT EVIDENTIARY FOUNDATION IS INCONSISTENT WITH DUE PROCESS.

"[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue." *Haslip*, 499 U.S. at 59. For this reason, this Court has recognized that a state may not reach decisions on matters of life, liberty or property without a basis for its action in the evidence.

For example, in *Schware v. Board of Bar Examiners of the State of New Mexico*, the Court found that a state bar could not deny an applicant the opportunity to take the bar examination when all of the evidence produced at trial showed him to be of good moral character, while the Board "called no witnesses and introduced no evidence" and there was "nothing in the record which suggests that [the applicant] has engaged in any conduct during the past 15 years which reflects adversely on his character." 353 U.S.

232, 236, 239 (1957). This Court has also found that a state may not imprison an individual for violating the conditions of his probation where the record "was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment." *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam); *see also Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 455 (1985) (finding that revocation of "good time credits" must be supported by "some evidence" in order to satisfy the minimum requirements of procedural due process).

In some instances, federal courts have reversed compensatory damage awards purely on the basis that the evidence was insufficient to support them, without invoking the Due Process Clause. For example, several courts have invalidated awards for emotional distress stemming from alleged constitutional violations when the evidence was vague and conclusory, and did not show the need for medicine, physical symptoms, psychological disturbance or counseling, loss of income or pecuniary expense, or other corroborative evidence. *See Price v. City of Charlotte*, 93 F.3d 1241, 1255-56 (4th Cir. 1996) (citing *Carey v. Piphus*, 435 U.S. 247, 262-63 (1978); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303, 1313 (7th Cir. 1985); *Hetzel v. County of Prince William*, 89 F.3d 169, 171-72 (4th Cir. 1996); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1304 (7th Cir. 1990); *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1201 (3d Cir. 1986)).

Indeed, this case is reminiscent of a lack of basic procedural rights that led the Tenth Circuit to reverse a district court decision upholding multi-

million dollar sanctions imposed by the Federal Trade Commission. (FTC). *See Federal Trade Comm'n v. Kuykendall*, 312 F.3d 1329 (10th Cir. 2002), *vacated on reh'g en banc*, 371 F.3d 745, 763 (2004) (agreeing with the panel that the district court failed to set forth an adequate basis for arriving at its $39 million figure). Before the corporations at issue presented their defense, the district court stated that it "sees no reason why we cannot be concluded with this matter by the close of business today," a statement the Tenth Circuit characterized as "strong medicine." *Id.* at 1340. Noting the complete lack of evidence in the record to support a $39 million compensatory award intended for consumer redress, the court stated:

> Such a casual finding of millions of dollars without one iota of explanation does not meet the fact-finding requirement of Rule 52. The court supplied absolutely no indication how it arrived at this amount—no formula, no set of guidelines, no explanation, not even the most rudimentary reckoning of cause and effect to demonstrate the extent and the manner in which the consumers had been damaged. Absent any explanation whatsoever, such an award is arbitrary and capricious.

Id. at 1342. Such a timeline and approach, the Tenth Circuit held, "exceeds the limits of permissible discretion and dangerously approaches a complete violation of procedural due process." *Id.*

III. WHAT DECIDING THIS CASE WILL AND WILL NOT DO

A. This Case Presents the Opportunity to Clarify and Reaffirm That Due Process Does Not Permit Arbitrary Awards

If this case is permitted to stand, then it will send a message that trial courts can act arbitrarily in their decision making without any significant pre-trial, post-trial, or appellate review. For example, courts could conduct trials without instructions, allow only one side of a case to be heard, or permit a $12 million award based on $12 worth of evidence or no evidence at all as was the case here.

Where, as here, a trial court has taken a "let it all go to the jury" approach and subsequently failed to conduct a thorough post-trial review to identify support, or the lack thereof, for the resulting multimillion-dollar award, due process requires appellate consideration. If the West Virginia Supreme Court of Appeals does not exercise its authority in such a case, then it falls to this Court, as the highest authority, to consider whether such an award comports with the principles of the Due Process Clause.

"When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Oberg*, 512 U.S. at 420 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Mississippi*, 297 U.S. 278 (1936); *In re Oliver*, 333 U.S. 257 (1948); *In re Winship*, 397 U.S. 358 (1970)). While this Court has found that "[p]unitive damages pose an acute danger of arbitrary deprivation of property" due to a jury's wide

discretion in choosing amounts and the potential for bias against big businesses, *id.* at 432, adequate pre- and post-trial review equally provides procedural safeguards against the danger of arbitrary compensatory damage awards.[2] Here, where such meaningful review was not present, this Court has an opportunity to clarify that fundamental principles of due process apply equally in such a context.

B. This Case Will Not Unduly Interfere With State Judicial Sovereignty or Make This Court a Final Arbiter of Every Excessive Compensatory Damage Award

This Court may be concerned that granting certiorari in this case might result in a decision that effectively requires states that do not have an intermediate appellate court to change their basic judicial structure or renders this Court the final arbiter of excessive compensatory damage awards. For the reasons noted below, the Court need not fear either result.

In addition to West Virginia, seven states, Montana, New Hampshire, Nevada, Rhode Island, South Dakota, Vermont, and Wyoming, as well as the District of Columbia, have only a single appellate court or lack an appellate division. *See* National Center for State Courts, State Court Caseload Statistics, 2005: State Court Structure Charts (2006), *available at* http://www.ncsconline.org/D_Research/csp/2005_files/State%20Court%20Caseload%20Statistics%202005.pdf (providing state court structure charts,

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[2] Moreover, application of procedural due process principles to punitive damages would have little effect if punitive damages are allowed to bleed into compensatory damages.

including a summary of each court's jurisdiction). According to the National Center for State Courts, of these eight jurisdictions, only West Virginia and New Hampshire do not provide their sole appellate court with mandatory jurisdiction over most civil cases. *See id.* While several other state supreme courts have purely discretionary review of civil cases, such as Tennessee, Texas, and, Wisconsin, in those states, there is an appeal as of right in the intermediate appellate court. *See id.* In other words, West Virginia is only one of two states in the nation in which there is a high risk that an excessive verdict resulting from a lack of procedural safeguards may face absolutely no appellate scrutiny.

Nevertheless, it is not amici's contention that this Court needs to or should uproot West Virginia's appellate structure and intrude upon its sovereign prerogative to design its judiciary. Rather, the lack of appellate review in West Virginia underscores the importance, indeed essential nature, of adequate procedures at the trial court level to guard against awards that are not tied to the evidence. Here, the trial court's abrogation of its role in considering the appropriateness of summary judgment and its decision to allow a multimillion dollar award to stand, despite expressing its concerns, demonstrates a violation of due process.

Finally, a decision in this case finding that the West Virginia Circuit Court's procedures were inadequate to satisfy due process will not place this Court in the position of acting as a state appellate court of last resort for excessive compensatory damage awards. This is not simply a case of an excessive compensatory award that a state court can address

through remittitur or other traditional means. This is a case of a court that went against its own clearly stated better judgment (even when there was ultimately no appellate review) and permitted an award to stand without any evidence supporting it. It presents an ideal vehicle for this Court to instruct that the Due Process Clause requires state judiciaries to provide meaningful procedures to guard against awards that are not supported by the evidence.

CONCLUSION

For the foregoing reasons, *amici curiae* request that this Court grant the Petition for a Writ of Certiorari in this action.

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No. 07-384

In the Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,

Petitioner,

v.

EAGLE RESEARCH CORP.,

Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of Putnam County, West Virginia

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Product Liability Advisory Council, Inc. (PLAC) moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has withheld consent.

PLAC is a non-profit corporation with 124 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of a wide array of products, including automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to the accompanying brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the federal and state appellate courts, including in many of this Court's cases addressing the review of jury damages awards. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415 (1996); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993). Because many of PLAC's members become defendants in lawsuits in which there is a risk that a jury will award damages that are not supported by the record, they have a vital interest in ensuring that there is meaningful and appropriate judicial review of compensatory damages awards and in the proper resolution of this case.

PLAC's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

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OCTOBER 2007

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

REVIEW IS WARRANTED TO DECIDE WHETHER THE MEAGER PROCEDURES EMPLOYED BY THE WEST VIRGINIA COURTS IN REVIEWING THE COMPENSATORY DAMAGES AWARD IN THIS CASE SATISFY DUE PROCESS 5

I. The Due Process Clause Requires Equivalent Procedural Protections With Respect To The Judicial Review Of Punitive And Compensatory Damages Awards 5

II. The Procedures By Which Damages Were Awarded In This Case Violate The Fourteenth Amendment 10

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases:

BMW of N. Am., Inc. v. *Gore*,
517 U.S. 559 (1996) 6, 16

Bankers Life & Casualty Co. v. *Crenshaw*,
486 U.S. 71 (1998) 10

Browning-Ferris Industries v. *Kelco*,
492 U.S. 257 (1989) 4

Cooper Indus., Inc. v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) 4, 6, 7, 9

Garnes v. *Fleming Landfill, Inc.*,
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BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

This case arises out of a West Virginia jury's multimillion-dollar award of damages in a contract case. Respondent Eagle Research Corporation (Eagle Research) alleged that petitioner Daniel Measurement Services (Daniel Measurement) breached a confidentiality agreement executed by the two companies that prohibited the sharing of each other's technology.[2] The only proper damages that could be awarded on Eagle Research's breach-of-confidentiality claim were for the "reasonable" and "ascertainable" losses suffered by Eagle Research that were "proximately caused by the breach." Pet. App. 44a.

The case was tried in the Circuit Court of Putnam County, West Virginia. Prior to trial, the trial judge declined to resolve any of the claims on the ground that "this is West Virginia" and "we don't give summary judgment." Pet. App. 47a. At the trial itself, there was no evidence presented that Eagle Research suffered *any* losses proximately caused by a breach of the confidentiality agreement. Nonetheless, the jury awarded damages of *$10.5 million* on that claim. *Id.* at 3a-4a. The only possible basis for the jury's substantial award was that it

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[1] Pursuant to S. Ct. Rule 37.6, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Respondent also asserted a claim based on breach of an oral contract, but the jury's award of damages on that claim is not at issue here.

represented a disgorgement of petitioner's profits. *Id.* at 53a-56a. The trial court, however, had rejected disgorgement as a proper measure of damages, and the jury was not instructed that it could award damages on this basis. *Id.* at 12a, 44a.

After the verdict, Daniel Measurement requested a new trial and other relief on the ground that there was no evidence whatsoever supporting the jury's $10.5 million damages award. In response to that motion, Eagle Research failed to point to any evidence in the record of losses it had suffered as a proximate cause of the breach of the confidentiality agreement and instead merely observed, "Who knows what [the jurors] were thinking." Pet. App. 8a. The trial court admitted that it was "concerned" about the $10.5 million award (*id.* at 12a), but nonetheless left it in place without making any findings or offering any rationale for that decision. *Id.* at 13a. The closest the district judge came was to speculate (as it turned out, erroneously) that Eagle Research might have challenged the jury instructions on the measure of damages, but "I cannot recall now" and "I can't wade through" the jury instructions "at this stage" and "so I'm going to leave that as it is." *Ibid.* Daniel Measurement then sought review of the trial court's denial of its motion for a new trial and other post-judgment relief in the West Virginia Supreme Court of Appeals, but appellate review is discretionary, not automatic, in West Virginia. Thus, although two Justices (one short of a majority) voted to hear the case, review was denied.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this case comes to the Court, the West Virginia jury's compensatory damages award of $10.5 million is completely bereft of evidentiary support and yet has never been the subject of any meaningful review by the West Virginia judiciary, either at the trial or appellate levels. This complete abdication of judicial responsibility raises in an unusually stark form a fundamental issue concerning the meaning of the Fourteenth Amendment's guarantee of due process of law. Review is warranted to clarify the minimum requirements of due process

in the important and recurring setting of judicial review of excessive or unsupported jury awards of compensatory damages. Although this Court's recent decisions concerning judicial oversight of civil jury awards have all come in the area of punitive damages, the same safeguards are required with respect to compensatory damages. The Court should grant review to make that clear.

I. The parity of treatment of punitive and compensatory damages when it comes to the minimum procedural safeguards required by due process finds support not only in history, tradition, and precedent but also in common sense. "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415, 430 (1994). At common law, jury awards of all types of damages, whether they would now be categorized as "compensatory" or "punitive," were subject to the same post-verdict review. For centuries, English courts have reexamined damages awards for excessiveness without differentiating between compensatory and punitive damages. Reviewing that history in *Oberg*, this Court observed that "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century * * *." *Id.* at 422 n.2. This Court therefore held in *Oberg* that the Constitution requires post-verdict review of the size of a damages award. *Id.* at 432.

Especially in cases such as this where a jury awards a multimillion-dollar "compensatory" damages award that is utterly lacking in evidentiary support, the line between compensatory and punitive damages is blurred if not obliterated. Compensatory damages are designed to allow a plaintiff to recoup losses it has suffered as a consequence of a defendant's tortious or wrongful conduct. The jury's award here, however, did not compensate respondent. To the contrary, there was no evidence in the record that respondent had actually suffered any compensable loss as a consequence of petitioner's alleged breach of the confidentiality agreement. The only plausible

explanation for the large size of the jury's verdict, then, is that the jury elected to take profits that Daniel Measurement earned from its alleged breach and simply transfer them to Eagle Research. Although taking away Daniel Measurement's profits may *deter* it from future wrongdoing (or even punish it for the breach of contract), those are established functions of *punitive* rather than compensatory damages. See *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); see also Bozyk, *Disgorging American Business: An Examination of Overbroad Remedies in Civil RICO Cases*, 59 RUTGERS L. REV. 129, 140 (2006) ("Disgorgement is inherently a punitive remedy since the remedy goes beyond deterring tortious behavior and compensating injured parties.").

II. The proceedings below clearly violated the Due Process Clause of the Fourteenth Amendment. The jury's baseless multimillion-dollar exaction should have been subjected to a "definite and meaningful constraint on discretion" as is required under this Court's punitive damages cases. *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991). See also *Oberg*, *supra*; *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993). The procedures used by the West Virginia courts in this case, however, fell woefully short of what the Due Process Clause requires. There was no review of the jury's decision by a court that did not preside over the trial – as was standard at common law – nor did any court provide a reasoned explanation for its decision to let the jury award stand. Indeed, the proceedings here offered substantially less protection than the two sets of procedures this Court has found sufficient to withstand scrutiny under the Due Process Clause. This case presents an ideal opportunity for this Court to clarify the procedures that due process requires before a defendant may be deprived of property by a jury's compensatory damages verdict. The need for additional guidance on this subject is just as pressing today as was the need for elaboration of the constitutional principles governing punitive damages in 1989, when this Court entered that field by deciding *Browning-Ferris Industries* v. *Kelco*, 492 U.S. 257 (1989).

ARGUMENT

REVIEW IS WARRANTED TO DECIDE WHETHER THE MEAGER PROCEDURES EMPLOYED BY THE WEST VIRGINIA COURTS IN REVIEWING THE COMPENSATORY DAMAGES AWARD IN THIS CASE SATISFY DUE PROCESS

In recent years, this Court has developed and clarified the due process limits on the discretion of civil juries in a line of cases involving punitive damages. See, *e.g.*, *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991); *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443 (1993). Yet as many with everyday experience with our civil litigation system will attest, the problem of arbitrary, excessive and even irrational jury awards is no less severe in the area of damages labeled as compensatory. Further review would serve to clarify the minimum constitutional standards of judicial review and oversight that must be applied, under the Due Process Clause, to compensatory awards to ensure that they do not effectuate arbitrary deprivations of property.

I. The Due Process Clause Requires Equivalent Procedural Protections With Respect To The Judicial Review Of Punitive And Compensatory Damages Awards

A. Under this Court's due process decisions, "traditional practice provides a touchstone for constitutional analysis." *Oberg*, 512 U.S. at 430. Indeed, "[b]ecause the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial." *Ibid.* At common law, jury awards of all types of damages, whether they would now be categorized as "compensatory" or "punitive," were subject to the same post-verdict review. English courts for centuries have reexamined damages awards for excessiveness without ever "differentiat[ing] between compensatory and punitive damages." DeCamp, *Beyond* State Farm: *Due Process*

Constraints on Noneconomic Compensatory Damages, 27 HARV. J.L. & PUB. POL'Y 231, 235 (2003). As this Court concluded in *Oberg*, "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century * * *." 512 U.S. at 422 n.2. See also *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. at 437 n.11 (2001) (describing historical overlap between compensatory and punitive damages).

What is more, English courts more readily and easily reviewed economic damages awards, such as the award in this case, than non-economic or exemplary damages awards. In cases involving economic damages, "'there was no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessiveness of damages, in cases where the quantum of damage really suffered by the plaintiff could be apparent.'" DeCamp, *supra*, 27 HARV. J.L. & PUB. POL'Y at 238 (quoting *Wilford* v. *Berkley*, 1 Burr. 609, 97 Eng. Rep. 472 (C.P. 1758)). Where the "damages 'were of such a nature that the Court could properly judge the degree of injury, and could see manifestly that the jury had been outrageous in giving such damages as greatly exceeded the injury'" (*ibid.*), it was beyond dispute that the defendant was entitled to some level of judicial process and review to ensure that the jury's award was not arbitrary.

That common law afforded (at least) the same procedural protections in connection with the award of compensatory and punitive damages is not surprising. The risk, as this Court's punitive damages jurisprudence makes clear, is not only that a defendant will be improperly "punished," but more fundamentally that the defendant will be arbitrarily deprived of property (in the form of a damages award) without due process of the law. "This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring). The same concern about

arbitrary deprivations of property applies to compensatory and punitive damages awards.

B. In theory, compensatory and punitive damages are designed to serve different purposes. Compensatory damages are plaintiff-focused and "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus.*, 532 U.S. at 432. See also 1 D. DOBBS, LAW OF REMEDIES § 3.1 at 281 (2d ed. 1993). Punitive damages, on the other hand, are defendant-focused, "operat[ing] as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Cooper Indus.*, 532 U.S. at 432. See also *Gore*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition); 1 D. DOBBS, *supra*, § 3.11(1), at 452.

In practice, however, damages that are labeled "compensatory" often fulfill goals more traditionally served by punitive damages. See 1 D. DOBBS, *supra*, § 3.11(1), at 455 & n.19. "'[C]ompensatory damages are usually admonitory as well as reparative.'" *Kalavity* v. *United States*, 584 F.2d 809, 811 n.2 (6th Cir. 1978) (quoting Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931)). For example, the collateral source rule,[3] which applies to the award of compensatory damages, is designed (at least in part) to ensure that a tortfeasor is deterred from future misconduct. See, *e.g.*, *Wilson* v. *Burch Farms, Inc.*, 627 S.E.2d 249, 257 (N.C. App. 2006) (describing collateral source rule as "punitive in nature"); *Leitinger* v. *DBart, Inc.*, 736 N.W.2d 1, 21-22 (Wis. 2007) (Roggensack, J., dissenting) (noting that collateral source rule permits double recovery on part of plaintiff). Indeed, the prevalence of compensatory damages awards that far exceed the

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[3] The collateral source rule provides that amounts obtained from a third party cannot be used to offset the compensatory damages paid by a tortfeasor. *Helfend* v. *S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 65-67 (Cal. 1970).

losses or injuries suffered by plaintiffs have led many knowledgeable commentators to express concern that compensatory damages awards – just like punitive damages awards – have become excessive. See DeCamp, *supra*, 27 HARV. J.L. & PUB. POL'Y at 234 ("[J]uries have increasingly awarded – and courts have upheld – unusually large awards of noneconomic compensatory damages."); Martin, "Litigation Abuse Running Amok in Wisconsin," HEARTLAND PERSPECTIVES (Jan. 9, 2006) available at http://www.heartland.org/Article.cfm?artID=18429.

The high incidence of multimillion-dollar compensatory damages awards in this country has also given rise to the valid concern that juries use compensatory damages to fulfill punitive goals. "[I]t is generally recognized * * * that juries give vent to their desire to punish the wrongdoer under the guise of increasing the compensatory damages * * *." *Wangen* v. *Ford Motor Co.*, 294 N.W.2d 437, 447 (Wis. 1980). According to one recent study, jurors who do not have the option to award punitive damages nonetheless punish the defendant by inflating compensatory damages. See Anderson & MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23 LAW AND HUMAN BEHAVIOR 313, 321 (1999). Similarly, other studies have shown that jurors increase their estimates of injury when the wrongdoer acted intentionally as opposed to negligently. Anderson & MacCoun, *supra*, at 316 (citing Darley & Huff, *Heightened Damage Assessment as a Result of the Intentionality of the Damage-Causing Act*, 29 BRIT. J. OF SOC. PSYCHOLOGY 181, 181-88 (1990)). Simply put, there is a very real risk that jurors will base compensatory damages – which are intended to be plaintiff-focused – on defendant-driven concerns such as the defendant's wealth or degree of culpability.

This case is illustrative. The trial court instructed the jury that it could award damages only for an amount of money that "fairly compensate[d]" Eagle Research for "reasonable" and "ascertainable" losses that were caused by Daniel Measurement's alleged breach of a confidentiality agreement.

Pet. App. 44a. Although Eagle Research had offered no evidence demonstrating that it had incurred any loss whatsoever, the jury nonetheless returned a verdict with an eight-figure damages award.

The jury's "compensatory" damages award appears to be based on the evidence Eagle Research presented concerning Daniel Measurement's profits on the sale of two devices. At trial, Eagle Research introduced two documents purporting to estimate petitioner's profits. One set the profits at approximately $5.9 million (Pet. App. 50a); the other, at approximately $14.3 million (*id.* at 51a). Notably, the $10.5 million jury award approximates the average of these two figures. Eagle Research's counsel relied on these documents to defend the jury's verdict (*id.* at 53a-56a), and suggested that the jury's award was a compromise between these two profit figures (*id.* at 8a). But an award of Daniel Measurement's profits is not consistent with the trial court's clear instruction that damages should consist only of Eagle Research's "ascertainable losses." Indeed, the trial court rejected an instruction that would have permitted the jury to award Daniel Measurement's profits on the breach-of-confidentiality claim. *Id.* at 42a, 43a-45a.

An award of a defendant's profits, such as the one in this case, is more consistent with an award of punitive damages than compensatory damages. Allowing a plaintiff to recover profits earned by a defendant does not compensate the plaintiff for its own losses. It instead deters the defendant from future wrongdoing by removing the reward for his past wrongful conduct, and thereby the incentive to engage in such conduct in the future. "[O]ne ground for seeking deterrence-measured [punitive] awards is that there are a number of cases in which, in the absence of such liability, the defendant would find it profitable to continue its misconduct because the profits are high and compensatory damages are low." 1 D. DOBBS, *supra*, § 3.11(3), at 477. But "deterrence has long been recognized as one of the reasons for *punitive* awards * * *." *Id.* § 311(3), at 476 (emphasis added). As deterrence is a goal of punitive damages, but not compensatory damages (see *Cooper Indus.*,

532 U.S. at 432), the jury's award here was, in effect, quite similar to an award of punitive damages. See also Bozyk, *Disgorging American Business: An Examination of Overbroad Remedies in Civil RICO Cases*, 59 RUTGERS L. REV. 129, 140 (2006) ("Disgorgement is inherently a punitive remedy since the remedy goes beyond deterring tortious behavior and compensating injured parties.").

Because juries' "compensatory" damages awards are often at least partially punitive in nature (as is the case here), it naturally follows that such awards must be subject to the same procedural due process standards as punitive awards. The oft-repeated concern about the arbitrariness and excessiveness of punitive damages rings true in this case: "'[T]he impact of these windfall recoveries is unpredictable and potentially substantial.'" *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) (quoting *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 87 (1998) (O'Connor, J., concurring in part and concurring in judgment)). Here, just as in *Oberg*, where this Court held that Oregon's law governing the award of punitive damages violated procedural due process, the "problem * * * is the possibility that a jury will not follow [the trial court's] instructions and may return a lawless, biased, or arbitrary verdict." 512 U.S. at 433. See also *id.* at 429 ("What we are concerned with is the possibility that a culpable defendant may be unjustly punished."). For all of these reasons, it makes perfect sense to apply the same procedural safeguards to compensatory awards as to punitive awards. Common sense thus points to the same conclusion as historical practice, tradition, and this Court's decisions.

II. The Procedures By Which Damages Were Awarded In This Case Violate The Fourteenth Amendment

The jury's award of damages in this case was not subject to the "definite and meaningful" constraint this Court's precedents require. See *Haslip*, 499 U.S. at 22. The jury violated the judge's instructions and awarded over $10 million in "compensatory" damages even though there was no evidence in

the record to support a finding that respondent had suffered *any* losses (let alone $10 million of losses) as a result of petitioner's breach of a confidentiality agreement.

The trial court's instructions to the jury made clear that the only appropriate measure of damages were losses that were proximately caused by petitioner's conduct. Pet. App. 44a. Although there was no evidence in the record to support a finding of *any* such loss, the jury nonetheless awarded $10.5 million, a figure that presumably represented a disgorgement of profits. The West Virginia trial court, however, did not instruct the jury that damages could be awarded on this basis, and the jury's award accordingly flatly violated the court's instructions.

During the argument on post-trial motions, the trial court appeared to agree with petitioner and informed the parties that it was "concerned" about the size of the jury award. Pet. App. 12a. But rather than take corrective action consistent with its doubts about the verdict, the court suggested that it was simply too much trouble to evaluate petitioner's objection to being compelled arbitrarily to pay more than $10 million on the basis of the jury's caprice: "I can't wade through the proceedings or the jury instructions at this stage, so I'm going to leave that as it is." *Id.* at 13a. The trial court clearly abdicated its duty to provide a meaningful review of the jury's verdict.

Even worse, petitioner was not entitled to appellate review of the trial court's decision. In West Virginia, appeals are discretionary, and a petition for appeal can be granted only by a majority of the 5 Members of the Supreme Court of Appeals. See W. VA. R. APP. P. 7. Accordingly, even though two Justices voted to hear petitioner's appeal (Pet. App. 28a), there was no review of the trial court's unexplained decision to deny the post-trial motions. Notably, only two other states – New Hampshire and Virginia – do not provide for any appeal as of right in civil cases. See U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *State Court Organization 2004*, at 133-35 tbl. 22 (2006) ("*State Court Organization*") available at http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf. Unlike West

Virginia, however, in both of those states, only *one* judge must vote to grant review in order to hear an appeal. See *id.* at 140-42 tbl. 24. West Virginia is therefore the only state in the Union in which petitioner would not have been entitled to an appeal under these circumstances.[4]

The "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that" the resulting "procedures violate the Due Process Clause." *Oberg*, 512 U.S. at 430. By not affording petitioner the right to appellate review of the jury's verdict, and by not requiring any reviewing court to set forth its rationale for sustaining the verdict, West Virginia's procedures as implemented in this case deviate from the common law. What is more, they provide far less protection than any set of procedures previously sustained by this Court as consistent with due process.

A. Appellate review of jury damages awards – and of trial judges' decisions to sustain those awards – dates back at least to thirteenth century English Courts. "Not only did the court of original jurisdiction have power to order a conditional remittitur, and were under a duty to amend an excessive verdict, but if they failed to do this, or could not decide it * * * it was referred to a higher tribunal." *Sunray Oil Corp.* v. *Allbritton*, 187 F.2d 475, 479 (5th Cir. 1951) (Holmes, J., dissenting) (internal quotation marks omitted). This practice was well established by the time William Blackstone published his

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[4] Respondent may argue that, because West Virginia has only one court with appellate jurisdiction, mandatory jurisdiction over all civil appeals would impose too great a burden on the state's judicial system. But thirteen states have only one appellate court with jurisdiction over civil cases. In ten of those states, the appellate court has mandatory jurisdiction over *all* civil appeals. See *State Court Organization*, at 133-35 tbl. 22. And in the other two states in which appellate jurisdiction is discretionary, as discussed above, it takes the vote of only one judge of the court for an appeal to be heard.

Commentaries in 1768. As Blackstone described it, the King's Bench was

> a court of appeal, into which may be removed by writ of error *all* determinations of the court of common pleas, and of *all* inferior courts of record in England. * * * Yet even this so high and honourable court is not the *dernier resort* of the subject; for if he be not satisfied with any determination here, he may remove it by writ of error into the house of lords, or the court of exchequer chamber * * *.

3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 43 (1978) (*Of Private Wrongs*) (emphasis added); see also *Sunray Oil*, 187 F.2d at 480 n.6 (Holmes, J., dissenting).[5] There were several grounds for objections to jury verdicts, including "that the jury have brought in a verdict without or contrary to the evidence" and that the jury "have given exorbitant damages." 3 W. BLACKSTONE, *supra*, at 387. The right of appeal was necessary, as Blackstone explained:

> If every verdict was final in the first instance, it would tend to destroy this valuable method of trial * * *. Next to doing right, the great object in the administration of public should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of by-standers, no party would go away satisfied unless he had a prospect of reviewing it.

Id. at 390.

This Court's opinions, regardless of whether they invalidated or sustained a state's procedures for awarding punitive damages, have emphasized the fundamental importance of appellate review. In *Haslip*, the Court emphasized the

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[5] To be sure, a right of appeal did not *always* exist in English courts. Prior to the establishment of a bill of attaint (the predecessor to the writ of error), objections to a jury verdict were resolved by "trial by battle." 3 W. BLACKSTONE, *supra*, at 389. Such was the Norman way.

importance of the Alabama Supreme Court's review of damages awards, stating that it "provides an additional check on the jury's or trial court's discretion." 499 U.S. at 20-21. And in *TXO*, the Court relied on the "unanimous" opinion of the West Virginia Supreme Court of Appeals that "gave careful attention to the relevant precedents" (509 U.S. at 465) to sustain the procedures used in that case. Thus, in *Oberg*, in which the Court held that the Due Process Clause requires judicial review of the amount of punitive damages awards, the Court noted that its prior decisions "stressed" the availability of both review by the trial court *and* subsequent appellate review. 512 U.S. at 420-21. The unavailability of appellate review of the jury's verdict, which is inconsistent with both the common law and this Court's decisions, resulted in procedures that fell short of the minimum requirements of the Due Process Clause.

B. Equally problematic as the lack of appellate review is that, in this case, no court ever articulated its reasons for sustaining the jury's verdict. As Blackstone explained, a meaningful and reasoned disposition of a motion for a new trial was essential at common law:

> Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled.

3 W. BLACKSTONE, *supra*, at 391. Indeed, in both *Haslip* and *TXO*, this Court discussed the importance of a well-reasoned and articulated opinion sustaining the jury's verdict. In *Haslip*, the court noted that Alabama "trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of damages.'" 499 U.S. at 20 (quoting *Hammond* v. *City of Gadsen*, 493 So.2d 1374, 1379 (Ala. 1986)). And in *TXO*, the Court reasoned that the West Virginia Supreme Court of Appeals' "thorough opinion"

served to ensure that the requirements of the Due Process Clause were satisfied. 509 U.S. at 465.

C. The complete lack of meaningful post-verdict review distinguishes this case from both of the cases in which this Court has sustained an award of punitive damages against a procedural due process challenge.

In *Haslip*, the Alabama Supreme Court had established procedures for a trial court's review of a jury's punitive damages verdict. Those procedures both directed the trial court to evaluate the damages award using specific factors, and required the trial court to articulate its reason for sustaining or setting aside the jury's verdict. 499 U.S. at 20. This procedure, the Court explained, "ensures meaningful and adequate review by a trial court whenever a jury has fixed punitive damages." *Ibid.* And, after the trial court's evaluation of the propriety of the verdict, the Alabama Supreme Court "provides an additional check" on the trial court proceedings. *Id.* at 20-21. The appellate court's review also entailed specific, articulated steps. Thus, it undertook a comparative analysis of punitive damages awards, and then "applic[d] the detailed, substantive standards it has developed for evaluating punitive damages awards." *Id.* at 21. "The application of these standards," this Court concluded, "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Id.* at 22.

The defendant in *TXO*, although that case also originated in West Virginia, also benefitted from procedures that were not present here and that imposed a "definite and meaningful constraint" on the jury's discretion. 509 U.S. at 497. During the hearing on TXO's post-verdict motions, the trial court described the defendant's conduct as "egregious" (*id.* at 451 n.12), a finding consistent with the jury's award of punitive damages. Moreover, the West Virginia Supreme Court of Appeals accepted review of the case, and issued a "thorough" opinion that "gave careful attention" to the relevant state and federal precedents. *Id.* at 465.

In stark contrast to these precedents, the trial court here articulated no reasons supporting its decision to sustain the jury's unsupported damages award. To the contrary, the only comment the trial court made with regard to the jury's $10.5 million verdict was that it was "concerned" about the amount. And there was no appellate review of the trial court's decision, despite the fact that two Justices (one vote short of a majority) believed the West Virginia Supreme Court of Appeals should hear petitioner's appeal. Accordingly, there was no articulation by *any* court of the rationale for sustaining the jury's verdict.[6]

Indeed, because of this Court's jurisprudence, West Virginia has set forth far stricter standards for the award and review of punitive damages than for compensatory damages. In *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court of Appeals announced that: "Following the dictates of *Haslip*, we here set out a new system for the review of punitive damages awards in West Virginia." *Id.* at 908. The Court set forth five specific factors that the trial judge must "carefully explain" to the jury. *Id.* at 909. It also described specific issues the trial court must consider in reviewing a jury's award of punitive damages. *Ibid.* With regard to the "compensatory" damages award in this case, on the other hand, the trial judge gave only a terse (albeit correct) instruction to the jury (Pet. App. 44a) and there were no standards governing the trial court's review. The Due Process Clause requires more: it requires some procedures that serve as

---

[6] The lack of adequate procedures for review of jury verdicts has real consequences. West Virginia recently was ranked the 49th worst legal system in the United States, and as a consequence many businesses do not want to conduct operations there. See REP. TODD TIAHRT, ECONOMIC COMPETITIVENESS CAUCUS, *Ending Lawsuit Abuse Is Vital for U.S. Competitiveness in a Global Economy*, available at http://www.house.gov/tiahrt/competitiveness/ec2_lawsuit.htm; AMERICAN TORT REFORM FOUND., *Judicial Hellholes 2006*, at 11 (2006), available at http://www.atra.org/reports/hellholes/report.pdf (ranking West Virginia as "Hellhole # 1" and stating that "there seems to be no reasonable limit on damages in the Mountain State * * *").

a "definite and meaningful constraint" on the jury's award of damages. Anything short of this "depriv[es] citizens of * * * property, through the application, not of law and legal processes, but of arbitrary coercion." *Gore*, 517 U.S. at 587 (Breyer, J., concurring).

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2007

APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
A.O. Smith Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
The Dow Chemical Company
E & J Gallo Winery

E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corp.
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Lyondell Petrochemical Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.

Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.

The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

a "definite and meaningful constraint" on the jury's award of damages. Anything short of this "depriv[es] citizens of * * * property, through the application, not of law and legal processes, but of arbitrary coercion." *Gore*, 517 U.S. at 587 (Breyer, J., concurring).

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Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
The Dow Chemical Company
E & J Gallo Winery

E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corp.
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Lyondell Petrochemical Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.

Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.

The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

MOTION FILED
OCT 2 2 2007

No. 07-384

IN THE
Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,
Petitioner,

v.

EAGLE RESEARCH CORP.,
Respondent.

On Petition for Writ of Certiorari to the Circuit Court of Putnam County, West Virginia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioners has consented to the filing of this brief. WLF wrote to counsel for Respondents to request consent but did not receive a response. Accordingly, this motion for leave to file is necessary.

WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, WLF regularly participates in tort reform efforts. WLF is concerned that economic development and consumer welfare not be impeded by improper and/or excessive damage awards in tort actions. To that end, WLF regularly participates in court proceedings touching upon the propriety and scope of damage awards. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *United States v. Bajakajian*, 524 U.S. 321 (1998); *BMW of North America v. Gore*, 517 U.S. 559 (1996).

WLF also has regularly supported efforts to expand the due process rights of litigants to seek appellate review of allegedly excessive or improper damage awards. *See, e.g., Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

WLF fully supports Petitioner's efforts to obtain review of the two Questions Presented in their petition. WLF is especially interested in participating in these proceedings,

however, because of its dismay over the manner in which this lawsuit and similar suits against out-of-state defendants have been handled by the West Virginia courts. WLF believes that something has gone seriously wrong here. In WLF's view, it is important for the Court to step in and remind the West Virginia courts that adherence to the rule of law requires that at least minimal judicial review be afforded to all jury verdicts – particularly verdicts as large as the massive compensatory damages award in this case.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It is filing due solely to its interest in ensuring further judicial review of the important issues raised by this case. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Dated: October 22, 2007

QUESTION PRESENTED

1. Whether a jury's award of compensatory damages that is based on no record evidence of loss to the plaintiff violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the Due Process Clause guarantees meaningful judicial review of a jury verdict to ensure that an award of damages is based on at least some record evidence.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. REVIEW IS WARRANTED TO DETERMINE THE EXTENT TO WHICH THE DUE PROCESS CLAUSE REQUIRES JUDICIAL SUPERVISION OVER JURY AWARDS 8

II. REVIEW IS WARRANTED BECAUSE THERE IS SUBSTANTIAL BASIS FOR CONCERN THAT WEST VIRGINIA COURTS ARE SYSTEMATICALLY DENYING DUE PROCESS RIGHTS 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases:

Bose Corp. v. Consumers Union of the U.S., Inc.
466 U.S. 485 (1984) 10, 11
BMW of North America v. Gore,
517 U.S. 559 (1996) 1, 8
Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 1, 11, 12
Estate of Fout-Iser v. Hahn,
649 S.E.2d 246 (W. Va. 2007) 14
Estate of Tawney v. Columbia Natural Resources LLC,
No. 03-C-10E, 2007 WL 91220 (Cir. Ct.,
Roane Co., W. Va., Jan. 27, 2007) 15
Estate of Tawney v. Columbia Natural Resources LLC,
219 W. Va. 266 (2006) 16
Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 1, 8, 15
Kocher v. Oxford Life Ins. Co.,
216 W. Va. 56 (2004) 15
McNary v. Haitian Refugee Center, Inc.,
498 U.S. 479 (1991) 11
Morris v. Crown Equipment Corp.,
219 W. Va. 347, *cert. denied*, 127 S. Ct. 835 (2006) ... 14
Ornelas v. United States,
517 U.S. 690 (1996) 11
Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 11
State ex rel. v. Mobil Corp. v. Gaughan,
211 W. Va. 106, *cert. denied*, 537 U.S. 944 (2002) 13
State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 1, 8

Page(s)

TXO Prod. Corp. v. Alliance Resources Corp.,
509 U.S. 443 (1993) 8
United States v. Bajakajian,
524 U.S. 321 (1998) 1, 8, 11
West Virginia ex rel. Johnson & Johnson v. Karl,
647 S.E.2d 899 (W. Va. 2007) 14, 15

Constitutional Provisions:

U.S. Const., amend. viii, Excessive Fines Clause 11

U.S. Const., amend. xiv, Due Process Clause ..... *passim*

U.S. Const., amend. xiv, Privileges
and Immunities Clause 13

Miscellaneous:

American Tort Reform Found., *Judicial Hellholes 2006*,
available at www.atra.org/reports/hellholes/report.pdf . 13

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth fully in the motion accompanying this brief.[1] In brief, WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, WLF regularly participates in tort reform efforts. WLF is concerned that economic development and consumer welfare not be impeded by improper and/or excessive damage awards in tort actions. To that end, WLF regularly participates in court proceedings touching upon the propriety and scope of damage awards. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *United States v. Bajakajian*, 524 U.S. 321 (1998); *BMW of North America v. Gore*, 517 U.S. 559 (1996).

WLF also has regularly supported efforts to expand the due process rights of litigants to seek appellate review of allegedly excessive or improper damage awards. *See, e.g., Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

Petitioner Daniel Measurement Services, Inc. (DMS) seeks review of a West Virginia state court judgment awarding compensatory damages of $10.5 million for breach of a confidentiality agreement that DMS entered into with a West Virginia-based company, Respondent Eagle Research Corp. (Eagle). There is literally *no* evidence in the trial record to support that award. Moreover, the West Virginia courts provided no meaningful review of the jury's award. DMS seeks review of whether an award of $10.5 million in compensatory damages under those circumstances violates DMS's rights under the Due Process Clause of the Fourteenth Amendment.

This litigation arose from a dispute between DMS and Eagle regarding their joint efforts to develop a commercially viable system for electronically measuring and transmitting natural gas production data. If such a system could have been developed, the parties contemplated that DMS would purchase a large number of flow computers from Eagle.

The largely undisputed evidence showed that: (1) DMS put out a Request for Proposal (RFP) to six flow computer manufacturers (including Eagle) for the purchase of equipment that would meet specifications set forth in the RFP; (2) DMS selected Eagle as its potential vendor because Eagle was willing to strip down its equipment in an effort to reduce costs and thereby increase the potential that the data measurement system could be rendered commercially viable; (3) DMS purchased (pursuant to written contracts) a small number of computers from Eagle for use as prototype equipment in developing the system; (4) two months after DMS and Eagle had begun development work, DMS entered into a written confidentiality agreement with Eagle whereby each party agreed not to share

confidential information obtained from the other party with anyone other than representatives of the party or its affiliates; and (5) DMS never entered into a written contract for the purchase of computers from Eagle (other than the prototype models mentioned above).

A major component of the system DMS hoped to develop was a communications system that would allow DMS to provide customers with secure, round-the-clock access to their proprietary gas flow measurements. DMS turned to another vendor, Luminant Worldwide Corp., to develop from scratch the software for the communications system. While multiple segments of the DMS project ran into an assortment of development problems, it was problems encountered by Luminant in developing cost-efficient software that played a major role in DMS's ultimate decision to abandon the entire project in 2000. DMS informed Eagle of its cancellation decision in October 2000 and sent a check for $138,000 to Eagle to cover all outstanding invoices (in addition to the more than $1 million that DMS had already paid Eagle), and Eagle cashed the check.

Eagle filed suit for breach of contract, taking the position that although no written contract was ever executed, the parties had entered into an oral contract for DMS to buy 3,000 flow computers from Eagle. DMS denied that any such oral contract existed and noted that DMS had not built any of the computers that were the subject of the supposed contract. The jury sided with Eagle on the oral contract issue and awarded Eagle $4 million in compensatory damages (an amount later reduced to $2 million by the trial judge). Those breach-of-contract damages are not at issue in this petition.

Eagle's lawsuit (filed in April 2003 in the Circuit Court of Putnam County, West Virginia), in addition to alleging

breach of oral contract, also alleged misappropriation of its trade secrets. The latter allegation was based on Eagle's claim that DMS had supplied trade secrets to Fisher Controls, an affiliate of DMS that manufactures flow computers.[2]

During the course of pre-trial proceedings, Eagle was forced to abandon its trade secrets claim. Eagle's own electrical engineering expert admitted under oath that Eagle's alleged trade secrets were not secrets and that there was no evidence of any trade secret violations. After dismissing its trade secret claims with prejudice, Eagle amended its complaint to allege that DMS breached the confidentiality agreement by passing information to Fisher Controls.[3]

At trial, Eagle introduced *absolutely no evidence* that it had suffered damages based on DMS's alleged breach of the confidentiality agreement. The judge instructed the jury as follows regarding damages for any such breach:

> If you find by a preponderance of the evidence that the defendant, DMS, breached the confidentiality agreement entered into by Eagle Research and DMS, then you may award damages in an amount of money which fairly compensates Eagle Research to the extent possible, for reasonable ascertainable losses caused proximately by the breach.

---

[2] DMS and Fisher Controls have a common corporate parent.

[3] Eagle never presented any direct evidence that such a transfer of information ever took place, and DMS denied having done so. In any event, the confidentiality agreement included a provision that permitted DMS to share confidential information with "affiliates," a term that undoubtedly included Fisher Controls.

Pet. App. at 44a. Eagle agreed that that instruction was a correct statement of the law. *Id.* at 7a, 42a.

The jury subsequently returned a verdict awarding $10.5 million in damages for breach of the confidentiality agreement. Ruling from the bench at a June 21, 2006 post-trial hearing, the trial judge denied DMS's motion to set aside that award, although he admitted, "I'm concerned with it." *Id.* at 12a-13a. The judge stated that his concern was based on the fact that the jury might have awarded damages based on Eagle's request that DMS be made to disgorge any profits earned from the alleged breach of the confidentiality agreement, even though the court had instructed that damages could only be based on *losses to Eagle* caused by the breach. *Id.*

On August 3, 2006, the court denied DMS's motion to reconsider that ruling, explaining that it was relying on the reasons stated at the June 21 hearing. *Id.* at 21a. That same day the court entered judgment for Eagle in the amount of $14.8 million, with $10.5 million of that amount representing damages for breach of the confidentiality agreement. *Id.* at 1a-5a, 22a-26a.

DMS petitioned the West Virginia Supreme Court of Appeals for leave to appeal. DMS argued explicitly that the $10.5 million damages award violated its due process rights under the U.S. Constitution. On May 22, 2007, the West Virginia Supreme Court of Appeals issued an order denying the petition by a 3-2 vote, without explanation.

REASONS FOR GRANTING THE PETITION

This petition raises issues of exceptional importance. The West Virginia courts have awarded $10.5 million for breach of a confidentiality agreement between the parties, despite the

absence of *any* record evidence to support that award. Indeed, Eagle does not make any claim to have introduced evidence at trial to support a claim that it was injured by the alleged breach of the confidentiality agreement. The Due Process Clause prohibits such arbitrary deprivations of property.

WLF recognizes that this Court is not in a position to correct every constitutionally excessive state court judgment, which are bound to occur with some frequency within even the best-managed court systems. But it is the failure of the West Virginia Supreme Court of Appeals to provide any meaningful review of the jury's verdict in this case that makes the case particularly worthy of this Court's attention. The trial judge expressed serious reservations about the $10.5 million damages award, but nonetheless upheld the award in an oral ruling from the bench without ever explaining what evidence he believed supported Eagle's claim that it had been damaged by the alleged breach of the confidentiality agreement. Pet. App. at 12a-13a.[4] West Virginia does not have an intermediate appellate court and thus does not permit any appeals of right in

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[4] Prior to trial, the judge explained his rationale for leaving all evidentiary issues in the hands of the jury. In explaining his unwillingness to grant summary judgment to DMS on the confidentiality agreement issue, the judge stated:

> [I]n the field of civil law, the only time I've ever been reversed in 14 years is when I grant summary judgment. There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed. Not every time literally, but that's where it is. Our system favors taking it to a jury.

Pet. App. 47a.

civil actions. Accordingly, the West Virginia Supreme Court of Appeals's denial of the petition for appeal meant that no appellate judge ever examined the propriety of the massive damages award and that the only review by any judge was the trial judge's cursory oral ruling from the bench that expressed serious concerns about the award and that provided no explanation of what evidence he believed justified the award. Review by this Court is warranted to determine whether such judicial abdication of supervision over jury awards violates a defendant's rights under the Due Process Clause.

Review is also warranted because of mounting evidence that the judicial system in West Virginia state courts is seriously askew. The American Tort Reform Foundation (ATRF), a nonprofit organization based in Washington, D.C., annually undertakes a study of judicial systems across the country to determine how well they do in protecting the rights of both plaintiffs and defendants in civil litigation. For several years running, ATRF has named the West Virginia state court system the "No. 1 Judicial Hellhole" in the United States. ATRF reports that there is a long history of alliances and close personal connections among personal injury lawyers, the state's attorney general, and local judges – with the result that out-of-state corporations sued in West Virginia often times have great difficulty in getting equal justice. There is substantial evidence to support the trial judge's view that the West Virginia Supreme Court of Appeals frowns on virtually all judicial review of factual determinations by a jury. Multi-million dollar judgments entered by West Virginia trial courts following jury verdicts routinely go unreviewed by the West Virginia Supreme Court of Appeals. By granting review in this case, the Court can make an important statement regarding the responsibility of state courts to take seriously the need to review jury verdicts to ensure that they are supported by evidence and are not constitutionally excessive.

I. REVIEW IS WARRANTED TO DETERMINE THE EXTENT TO WHICH THE DUE PROCESS CLAUSE REQUIRES JUDICIAL SUPERVISION OVER JURY AWARDS

The Due Process Clause of the Fourteenth Amendment has long been understood to include a substantive component that prohibits the States from depriving individuals of life, liberty, or property where the deprivation is "grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). *See also TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 (1993) ("[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits beyond which penalties may not go.") (internal citations omitted). That substantive limitation on government deprivations of private property has regularly been applied by the Court to impose limitations on the size of damage awards, particularly punitive damages awards, imposed by state and federal courts. *See, e.g., BMW of North America v. Gore*, 517 U.S. 559, 562 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

Applying the "grossly disproportional" standard, the constitutional impropriety of the $10.5 million compensatory damages award in this case is readily apparent. Any objective review of the record in this case can lead to only one conclusion: there is *absolutely no evidence* in the record from which the jury could rationally have concluded that Eagle was injured by DMS's alleged breach of the confidentiality agreement. Accordingly, *any* award of damages to "compensate" Eagle for such injuries – and certainly an award of $10.5 million – would be grossly disporportional to DMS's offense and thus a violation of DMS's due process rights.

But this Court has also recognized that due process rights extend well beyond a simple boilerplate right not to be subject to grossly excessive damages awards. Due process also requires that court systems provide meaningful review of jury awards to ensure that protections against excessive damages awards are actually being enforced. Thus, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that the Due Process Clause requires judicial review of the amount of punitive damages awarded by a jury to ensure that the award is not constitutionally excessive. *Oberg* involved an Oregon constitutional provision that prohibited judicial review of the size of punitive damages awards unless there was no evidence to support an award in any amount. The Court struck down that Oregon provision, ruling that the provision violated a defendant's due process rights because Oregon, "unlike the common law, provide[d] no assurance that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Id.* at 429. In the course of reviewing the history of common law protections against arbitrary damages awards, the Court noted that the common law did not distinguish between compensatory damages and punitive damages and provided protection against grossly excessive damages of either kind. *Id.* at 422 n.2 ("there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century"). Accordingly, *Oberg* stands for the proposition that the Due Process Clause requires West Virginia to provide some meaningful degree of judicial review to the jury's award in this case, to determine whether the award is grossly excessive in comparison to the evidence of harm caused to Eagle by DMS's conduct. Review is warranted to determine whether West Virginia met its constitutional obligation, and to provide guidance to other courts regarding the extent of such obligations.

Because of the importance of rights protected by the Constitution, the Court has regularly required exacting review of allegations that those rights are being violated. Indeed, in many instances, the Court has required appellate courts to undertake *de novo* review of lower court decisions rejecting an assertion of constitutional rights. As the Court has explained:

> The requirement of independent appellate review . . . is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. . . . Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold.

Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485, 510-11 (1984).

Thus, in *Bose*, the Court held that *de novo* review of whether speech claimed to be protected by the First Amendment was motivated by actual malice was essential to protect the "precious liberties established and ordained by the Constitution." *Id.* at 511. The Court so held, even though the issue of whether a speaker is motivated by actual malice is largely fact-based and thus an issue whose determination might normally be left in the hands of the trier of fact. The court explained that largely factual issues may cross over into the legal realm, warranting careful, independent appellate review, especially where "the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the trier of fact." *Id.* at 501. As a matter of federal constitutional law, minimal restrictions on jury discretion and

cursory appellate review are insufficient to safeguard constitutional rights. *See id.* at 506-07 ("We have therefore rejected the contention that a jury finding . . . is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations apply.")

See also McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 493 (1991) (constitutional violations are reviewed *de novo*); *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (*de novo* standard of review must be applied in reviewing a probable cause or reasonable suspicion determination in the case of a warrantless search in violation of the Fourth Amendment); *Bajakajian*, 524 U.S. at 337 (whether a forfeiture penalty is grossly excessive and thus violates the Eighth Amendment's Excessive Fines Clause is reviewed *de novo*).

Citing many of the foregoing precedents, the Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), determined that appellate courts should apply a *de novo* standard of review when passing on trial courts' determinations of the constitutionality of punitive damages awards. The Court found support for that determination in its *Haslip* decision, stating that "'appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" *Id.* at 436 n.9 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991)).

WLF does not mean to suggest that due process challenges to the size of *compensatory* damages awards should necessarily be subject to *de novo* review. WLF recognizes that a jury's determination of compensatory damages is in some senses more fact-based than a determination of punitive

damages. *See, e.g., Cooper Industries*, 532 U.S. at 437. Accordingly, there may be valid reasons for providing a somewhat more deferential standard of review when considering due process challenges to the size of compensatory damages awards. Nonetheless, all the decisions cited above serve to highlight the importance of meaningful judicial review of *any* jury finding that could pose a threat to constitutional rights. Certainly, the virtually non-existent judicial review provided in this case by the West Virginia courts would not appear to comply with due process rights. Review by this Court is warranted to correct that error and to provide federal and state courts with guidance regarding what level of judicial review is required by the Constitution.

II. REVIEW IS WARRANTED BECAUSE THERE IS SUBSTANTIAL BASIS FOR CONCERN THAT WEST VIRGINIA COURTS ARE SYSTEMATICALLY DENYING DUE PROCESS RIGHTS

Unfortunately, DMS's difficulties in obtaining meaningful judicial review of its due process claims do not appear to be unique within West Virginia. The State's courts have developed a reputation in recent years for denying equal justice to out-of-state defendants and for being overly solicitous to the concerns of the plaintiffs' bar. Review is warranted to provide the Court with an opportunity to make a strong statement regarding the responsibility of state courts to take seriously the need to review jury verdicts to ensure that they are supported by evidence and are not constitutionally excessive.

The American Tort Reform Foundation (ATRF), a nonprofit organization based in Washington, D.C., annually undertakes a study of judicial systems across the country to determine how well they do in protecting the rights of both plaintiffs and defendants in civil litigation. For several years

running, ATRF has named the West Virginia state court system the "No. 1 Judicial Hellhole" in the United States.[5] ATRF, *Judicial Hellholes 2006* (hereinafter "*JH2006*"), available at www.atra.org/reports/hellholes/report.pdf.

Among the report's findings: "The state has a history of alliances and close personal connections among personal injury lawyers, the state's attorney general, and local judges." *Id.* at iv. Among local procedural rules that plaintiffs' lawyers find particularly attractive is one that "allow[s] them to group together thousands of individual claims" (often asbestos claims) against a single corporate defendant, thereby allowing them to impose "enormous pressure on defendants to settle." *Id.* at 11 (citing *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 106, *cert. denied*, 537 U.S. 944 (2002)). Although the West Virginia legislature on occasion has adopted reform measures designed to improve the legal climate in the State, the West Virginia Supreme Court of Appeals has issued decisions that have effectively thwarted those measures. For example, the report noted that after the legislature sought to reduce forum shopping by adopting a law (similar to laws in effect in a number of other States) that denies jurisdiction to nonresident plaintiffs whose cause of action arises outside the State, the West Virginia Supreme Court of Appeals struck down the law on the grounds that it discriminated against out-of-state residents under the Privileges and Immunities Clause of the

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[5] The ATRF has been criticized on occasion by the plaintiffs' bar for being biased in favor of the interests of the defense bar. Regardless whether those criticisms are valid, the can be no claim that the ATRF is biased against specific jurisdictions. No one has suggested, for example, that the ATRF would single out West Virginia for special criticism for any reason other than its belief that West Virginia is the most plaintiff-friendly jurisdiction in the country.

U.S. Constitution. *Id.* at 13 (citing *Morris v. Crown Equipment Corp.*, 219 W. Va. 347, *cert. denied*, 127 S. Ct. 835 (2006)).

Far from encouraging trial courts within the State to review jury verdicts to ensure that the amount awarded is within constitutional limitations, the West Virginia Supreme Court of Appeals actively discourages such efforts. The trial judge's pre-trial admission – that he virtually never grants summary judgment because the Supreme Court of Appeals regularly reverses him when he grants a summary judgment and in virtually no other circumstances, Pet. App. 47a – is eminently understandable in light of the Supreme Court of Appeals's track record of regularly reversing trial courts that grant summary judgment based on findings that the plaintiffs failed to submit sufficient evidence to support their claims. *See, e.g., Estate of Fout-Iser v. Hahn*, 649 S.E. 2d 246 (W. Va. 2007) (grant of summary judgment reversed in medical malpractice case, even though (as the dissent pointed out) the plaintiff's expert witness had testified that the moving party's actions had not caused the plaintiff's injuries).

The Supreme Court of Appeals recently dramatically expanded the potential liability of pharmaceutical manufacturers[6] by doing away with the learned intermediary doctrine, pursuant to which manufacturers of prescription drugs often are absolved from liability for failing to provide specific health warnings to consumers of their drugs, if the drugs were prescribed by the consumer's doctor and the warnings were provided to that doctor. *West Virginia ex rel. Johnson & Johnson v. Karl*, 647 S.E.2d 899 (W. Va. 2007). The learned intermediary rule has been adopted by virtually every other

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[6] None of the major or mid-sized American pharmaceuticals manufacturers have a principal place of business in West Virginia.

state that has considered the rule. Given the difficulty that drug companies have in identifying precisely who their patients are, the *Karl* decision opens up a whole new avenue for large West Virginia judgments against out-of-state defendants.[7]

Because West Virginia is one of only a handful of States that have not created an intermediate appellate court, the potential that jury awards will escape meaningful appellate review is significantly higher in West Virginia than elsewhere. Indeed, this case is not an aberration – the West Virginia Supreme Court of Appeals regularly denies review in appeals from large trial court judgments. For example, in a recent case arising from a dispute over non-payment of a $12,000 disability insurance claim, the court declined to review a $5 million compensatory damages judgment entered against the defendant insurer. *Kocher v. Oxford Life Ins. Co.*, 216 W. Va. 56 (2004).[8] The court has not yet agreed to review a recent $270 million punitive damages award for breach of a natural gas royalty contract. *Estate of Tawney v. Columbia Natural Resources LLC*, No. 03-C-10E, 2007 WL 91220 (Cir. Ct., Roane County, Jan. 27, 2007).[9]

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[7] This Court has explained the need to protect out-of-state companies from local prejudice as a principal reason for requiring meaningful judicial review of large damages awards. *Oberg*, 512 U.S. at 432.

[8] The court reviewed and ultimately overturned a $34 million punitive damages judgment in the same case, finding that the trial judge erred in instructing the jury that it was *required* to award punitive damages to the plaintiff. The court remanded the case for a new trial on punitive damages. *Id.*

[9] The punitive damages award is particularly surprising given that the meaning of the royalty agreement had been in considerable, good-

(continued...)

WLF respectfully submits that West Virginia's widespread reputation for denying equal justice to large, out-of-state defendants provides an additional reason for granting the petition. Review is warranted to provide the Court with an opportunity to make a strong statement regarding the responsibility of state courts to take seriously the need to review jury verdicts to ensure that they are supported by evidence and are not constitutionally excessive.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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[9](...continued)
faith dispute for some time until the Supreme Court of Appeals last year answered several certified questions regarding its meaning. *Estate of Tawney v. Columbia Natural Resources, LLC*, 219 W. Va. 266 (2006).